Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

ANNETTE CARMICHAEL, Individually, and as Guardian for KEITH CARMICHAEL, an incapacitated adult,
Petitioners,

v.

KELLOGG, BROWN & ROOT SERVICES, INC., HALLIBURTON ENERGY SERVICES, INC. and RICHARD IRVINE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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December 9, 2009

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QUESTIONS PRESENTED

1. Whether a private military contractor in Iraq should be afforded *de facto* immunity under the political question doctrine for catastrophically injuring a U.S. soldier in an automobile wreck during a routine convoy.

2. Whether a U.S. soldier catastrophically injured in Iraq during a routine convoy can recover against a private military contractor when the civilian driver who caused the wreck was unqualified and overworked.

RULE 29.6 DISCLOSURE

Respondents Kellogg, Brown & Root Services, Inc. and Halliburton Energy Services, Inc. are publicly-traded companies.

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Annette Carmichael, Individually, and as Guardian for Keith Carmichael, an incapacitated adult, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the Court of Appeals is reported at 572 F.3d 1271 and is reproduced in the Appendix herein at 1a-56a. The decision of the U.S. District Court for the Northern District of Georgia is reported at 564 F. Supp. 2d 1363 and is reproduced in the Appendix at 57a-77a.

JURISDICTION

The judgment of the court of appeals was issued on June 30, 2009. Pet. App. 1a. Petitioner's timely petition for rehearing and rehearing on en banc was denied on September 11, 2009. Pet. App. 80a. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The relevant constitutional provision involved is U.S. Const., art. III, § 2, cl. 1. Pet. App. 82a-83a.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

This case concerns the question of whether the U.S. Court of Appeals for the Eleventh Circuit properly expanded the political question doctrine to afford a

private military contractor *de facto* immunity from suit for negligently injuring a U.S. soldier during a routine convoy, where none of the claims raised in the suit require the court to second guess or reexamine any military decision. The case arises from the negligence of Richard Irvine, an employee of Kellogg, Brown & Root Services, Inc. ("KBR"), when Irvine negligently drove his tanker truck off the road in a fuel convoy in Iraq and rolled it over onto Army Sgt. Keith Carmichael, leaving Sgt. Carmichael in a persistent vegetative state. Although Petitioners have not blamed the military in any way and none of Petitioners' claims implicate any military decision, Respondents have tried to bootstrap a political question into the case and thereby obtain effective immunity for Sgt. Carmichael's catastrophic injuries by arguing that military decisions, such as the choice of route for the convoy, were the supervening or concurrent causes of Sgt. Carmichael's injuries. Respondents argued, and the Eleventh Circuit agreed, that the political question doctrine prohibits a jury from even considering whether military decisions were the concurrent or supervening cause of the wreck. No case before has ever given such an expansive reading to the political question doctrine.

The political question doctrine prohibits courts from deciding political questions, such as whether the war is proper, not from hearing cases against private companies that involve facts tangentially related to political decisions. The political question doctrine does not give civilian contractors *de facto* tort immunity for careless driving. Nor does it give civilian contractors *de facto* tort immunity for negligently hiring an unqualified driver and overworking that driver.

KBR's own business documents and investigation of the incident found Irvine to have caused the incident and reprimanded him. The parties have conducted extensive discovery in this case and none of the witnesses or voluminous documents indicate that the Army did anything to cause the incident. To the contrary, the record demonstrates the incident was solely caused by Irvine's simple negligence when he drove off a roadway and rolled Defendants' tanker truck onto Sgt. Carmichael. None of the other drivers drove off the road that day. The first time Army decisions were blamed for the wreck was when they were raised in this case to attempt to create a political question defense.

At the time of the incident, a convoy of tanker trucks operated by KBR was transporting military fuel from Camp Anaconda to Al Asad. Sgt. Carmichael was riding on Mr. Irvine's tanker truck to provide security. Although the military decided when the convoys were to be arranged, the routes travelled, and a military commander rode in the lead vehicle and set the general speed of the convoy, KBR selected the drivers for the convoy, dictated where to place each driver in the convoy, and was vested with authority to remove any driver KBR supervisors deemed to be unfit. (Court of Appeals Record - R3-98-73; R3-103-126-27).

Irvine testified that while driving in the convoy his driving responsibilities for KBR were the same as if he was driving back home. (R3-98-99-100). He was supposed to avoid obstacles in the roadway, avoid any thing that could cause him to crash or stop, and he was supposed to keep the truck on the road and not allow it to roll over. (R3-98-98-99). Irvine testified that while in the convoy he would not even talk to the

military commander. (R3-98-96). Irvine admitted that he was supposed to exercise proper precautions while driving and should not drive off the road or drive too fast. (R3-98-99). He admitted that while driving through the curve at issue he was personally responsible for deciding when to apply the brakes, how to steer the truck, and at what speed to go through it. (R3-98-206-10). Irvine admitted that if he had felt like he was going too fast, he should have applied his brakes. (R3-98-163). He testified that he had discretion to speed up or slow down as necessary in order to safely negotiate the curve. (R3-98-163, 174).

KBR supervisors Stonebraker and Brockett testified that there is nothing the military does to lock in the speed of each individual truck and that it is the responsibility of each individual KBR driver to safely drive his vehicle in the convoy and to safely brake and maneuver through turns or around hazards. (R3-98-206-07; R3-103-45, 48). Stonebraker testified it was Irvine's responsibility to slow his vehicle to an appropriate speed and steer the truck through the curves properly. (R3-103-79; R3-100-53).

On the convoy in question, Irvine was sixth in line. (R3-98-92). Stonebraker was in the first convoy truck as KBR's convoy supervisor. (R3-98-176; R3-103-29). The incident occurred on a blacktop road in a series of S-curves. (R3-98-169; R3-103-35; R3-99-29). According to the only eyewitness to the rollover, when Irvine approached the second curve, he drove the truck too far over to the right-hand side of the road and went off the road, which caused the tanker to slide and then roll over. (R5-97-Ex. 17, pp. 11, 14, 16, 17, 26, 97). No other convoy driver drove off the roadway. (R3-98-102; R3-99-45; R5-97-Ex. 17, p. 22; R3-100-50; R5-97-Ex.

17, p. 26). According to the sole eyewitness, there was no reason for Irvine to drive off the roadway. (R5-97-Ex. 17, p. 27). When Irvine tried to get the truck back on the roadway, the tires hit the edge of the roadway and then the tanker flipped. (R5-97-Ex. 17, p. 17, 26, 97). Irvine even admitted that since the truck in front of him made it safely through the curve, then he should have too. (R3-98-210).

KBR's own internal investigation found the wreck was caused by Irvine traveling at an "excessive speed while negotiating a curve [and] not paying attention to surroundings." (R5-97-Ex. 4). None of KBR's documents, incident reports or drivers indicated that any decision made by the military caused the rollover incident in any way.

When KBR's Post Accident Review Board ("PARB") recommended that Irvine serve a short suspension and then return to driving duties, Art Lange, KBR's Deputy Project Manager, determined that the punishment was insufficient and mandated that Irvine permanently be removed from driving duties. (R3-100-38-39). Lange testified that he doubted Irvine's skills as a driver and could not in good conscience allow Irvine to continue to drive for KBR. (R3-100-29-30, 32-33). KBR's final report concluded that the "root cause" of the rollover incident "was speed in excess and failure to control the vehicle." (R3-101-47; R3-100-42; R5-97-Ex. 7). As evidence that Irvine had discretion to slow down through the curve, Irvine testified that the next time he drove through the S-curves, he drove very slow to look at the rollover site. (R3-98-108). The testimony of Irvine and his KBR supervisors make it clear that Irvine had discretion to slow his vehicle through the curve, was responsible to do whatever was

necessary to safely negotiate the curve, and was not qualified to drive.

KBR convoy supervisor Stonebraker testified that while driving on a convoy, KBR's drivers have to follow the rules of the road, such as not following too closely, and they should be aware of their surroundings. (R3-103-19). According to Stonebraker, when carrying fuel, there are additional considerations when making turns because of the fuel shift. (R3-103-21). The driver should slow down before the turn and never brake in a turn because breaking could cause the driver to lose control of the vehicle. (R3-103-21). Stonebraker testified that it was his responsibility, not the Army's, to radio the KBR driver and have him correct spacing if the driver slowed and disrupted the appropriate spacing. (R3-103-47).

KBR's safety department assesses the driver's ability to safely operate the vehicle from their testing before drivers are assigned to a convoy. (R3-103-126). On the morning of a convoy, if one of the drivers is physically ill or unfit to drive, it is the KBR convoy commander's responsibility to pull the driver off the convoy. (R3-103-126-27). According to Stonebraker, as convoy supervisor, he is responsible for ensuring that the drivers can safely operate their vehicles and for conducting the convoy in a safe and professional manner on the date at issue. (R3-103-131).

On the day of the incident, May 22, 2004, the KBR drivers went through the convoy preparation process with nothing out of the ordinary occurring. (R3-103-34). According to Irvine, the weather was pretty clear, with good visibility and not a lot of wind and nothing out of the ordinary happened before the wreck. (R3-

98-87-88-92). The convoy did not encounter any hostile activity prior to the wreck. (R3-103-52; R3-99-19).

Irvine testified that he had driven the route at issue previously, so the S-curves were no surprise. (R3-98-81-82, 92). According to Irvine, as he drove the truck into the S-curves, first he turned to the left and was getting ready to turn back to the right to go around the next curve when the truck overturned. (R3-98-102; R3-103-69). The five trucks in front of Irvine took the turn successfully. (R3-98-103; R3-103-141). Irvine admitted that if the truck in front of him made it through the S-curve safely, then he should have also. (R3-98-210).

With regard to the pace of the military vehicles, Stonebraker testified that as the KBR convoy supervisor, if he felt the military vehicle leading the convoy drove through the curves at a speed that was too fast for a tanker, he should slow down his truck. (R3-103-170). Stonebraker testified that a KBR driver should not let any other vehicle dictate or control how he maneuvers his vehicle, and he should drive his truck according to what is safe. (R3-103-170-71).

KBR supervisor Holmes Brockett also testified that KBR drivers are responsible for taking curves at the appropriate speed and keeping the vehicle on the roadway. (R3-99-35, 36). Brockett further testified that driver errors, such as control of the vehicle and leaving the roadway, are the KBR driver's responsibility. (R3-99-43). According to Stonebraker, it is KBR's policy that every employee is a safety officer and any employee has the right to stop work due to safety concerns. (R3-103-119-120). A KBR

employee could stop doing something if they were concerned about their own safety. (R3-103-120).

None of KBR's documents, incident reports or drivers directly indicated that any decision made by the Army contributed to the rollover incident in any way. In fact, the "contributing factors" listed in Defendant KBR's Incident Report for the May 22, 2004 wreck are "driver not paying attention to surroundings" and "excessive speed while negotiating curve." (R5-97-Ex. 4). Yet another document, KBR's Written Counseling Form provided to Irvine, indicated that "the root cause of this infraction is you lost control of your vehicle in a curve which caused your vehicle to roll over." (R5-97-Ex. 8). Irvine testified that he understood that the finding of "excessive speed," indicated that he should have been going slower prior to the wreck. (R3-98-132). The Written Counseling Form also indicated that Irvine was an inexperienced driver as it relates to this case. (R5-97-Ex. 8) (emphasis added). It is only in KBR's legal papers seeking to dismiss the case that they for the first time allege that decisions made by the Army in any way contributed to the incident. After the investigation, KBR permanently removed Irvine from driving tanker trucks, and he was reassigned to a non-driving job. (R3-98-114, 189, 198; R3-103-91).

There is also evidence that KBR negligently hired and retained Irvine. Initially, Mr. Irvine applied for a job at KBR but was turned down because he failed a medical exam. (R3-98-30, 32-33). Approximately one month later, KBR sent Irvine through the screening process again and this time hired him. (R3-98-38-39). The time cards completed by Irvine indicate that he worked an extraordinary number of hours in the weeks

leading up to the rollover. Irvine was sixty-six years old on the date at issue, and his time cards indicated that for the week of May 9 through May 13, he worked 12 hour days. (R3-98-191). Although Irvine claimed that a lot of time on the card was probably bunker time at night, he submitted a time card to KBR for 99.5 hours of pay that week. *Id.* Similarly, for the week of the incident, Irvine's time cards show he worked a total of 86 hours that week before the incident, and on the day of the wreck he worked another 12 hours. (R3-98-192-93). Irvine's work schedule and oversight of his hours of service were all within the control of Defendant KBR.

REASONS FOR GRANTING THE WRIT

I. NO APPELLATE COURT HAS EVER BEFORE DISMISSED A CASE AGAINST A PRIVATE ENTITY ON POLITICAL QUESTION GROUNDS

Based upon Petitioners' research, no court before has dismissed a case against a private entity on political question grounds. Whether the political question doctrine should be expanded to grant private military contractors *de facto* immunity from suit when they negligently injure U.S. soldiers is an important question. The United States military is using private contractors to an extent unprecedented in prior conflicts, and the decision of the Eleventh Circuit grants the civilian contractors expansive protection from suit for their negligence. Lower courts need guidance from this Court as to how the political question doctrine applies to the relationship between private military contractors and soldiers. Only this Court can settle such an issue. The Eleventh Circuit

has effectively ruled that a civilian contractor driver does not have a duty to operate his vehicle non-negligently if he is transporting military goods.

II. JURY DETERMINATION OF WHETHER KBR AND IRVINE WERE NEGLIGENT DOES NOT REQUIRE THE REEXAMINATION OF ANY MILITARY DECISION.

This Court held in *Marbury v. Madison* that "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). Thus "[t]he nonjusticiability of a political question is primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210, 82 S. Ct. 691 (1962). The political question doctrine "is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government ...." *United States v. Munoz-Flores*, 495 U.S. 385, 394, 110 S. Ct. 1964 (1990). There are six formulations which may indicate that a political question exists:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] a lack of judicially discoverable and manageable standards for resolving it; [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] an unusual need for

> unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. at 217. This Court has cautioned, however, that the doctrine "is one of 'political questions,' not one of 'political cases.'" *Baker v. Carr*, 369 U.S. 186, 218, 82 S. Ct. 691 (1962).

The Eleventh Circuit held that Petitioners' suit raises a political question under *Baker's* first factor because, the court stated, in order to determine whether KBR or Irvine was negligent, the court would have to review sensitive military judgments and decisions. Pet. App. 16a. It is clear from the court's opinion and the facts of the case, however, that no such review is required. Under the first *Baker* factor, the political question doctrine bars only judicial *review* or *reexamination* of decisions constitutionally committed to a coordinate branch.. *Baker v. Carr*, 369 U.S. 186, 217 (1962). It does not bar the adjudication of cases that may touch on political issues but that do not require the court to review or reexamine a political question.

Contrary to the plain meaning of the words "review" and "reexamine," the Eleventh Circuit held that a court cannot consider whether decisions made by the military were concurrent or supervening causes of the automobile wreck, because to do so would be to review or reexamine the merits of those military decisions. Pet. App. 16a-27a. The court goes on to say that in order to avoid the review of military decisions, Petitioners must show that the sole cause of Sgt.

Carmichael's injuries was the negligence of KBR and Irvine. Pet. App. 24a. The Eleventh Circuit's analysis is incorrect and represents an expansion of the political question doctrine beyond that conceived in any prior case.

First, "review" means "[t]o reexamine judicially..." or to "consider[] for purposes of correction." Black's Law Dictionary 1320 (6th Edition 1990). This case does not require the review of any military decision. Second, on a motion to dismiss, the court should not consider the merits of Petitioners' claims.[1] Petitioners do not have to prove at this stage of the proceedings that Respondents were the sole proximate cause of the wreck. The political question doctrine bars judicial review or reexamination of the merits of the alleged concurrent or supervening causes, e.g., route selection; it does not bar a jury from determining whether military decisions were concurrent supervening causes of the wreck. This is an unprecedented expansion of the political question doctrine, which effectively grants military contractors in Iraq and Afghanistan broad immunity for negligently injuring soldiers and others.

In every negligence case, the standard of care is that of a reasonably prudent person under like circumstances. *See, e.g., Thurman v. Applebrook Country Dayschool, Inc.*, 278 Ga. 784, 787, 604 S.E.2d 832 (2004). The jury looks at the circumstances that existed at the time of the incident and determines whether in the face of those circumstances, the defendant acted in a reasonably prudent manner.

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[1] The dissent correctly pointed out that the court should not consider the merits of Petitioners' claims. Pet. App. 53a.

Here, the jury would look at the circumstances which existed at the time Irvine drove into the curve and determine whether under those circumstances he acted reasonably. The jury could conclude that given the Army's choice of route, given the time for the convoy selected by the Army, and given other Army decisions, Irvine was not negligent for driving off the road. But the jury would not have to review the merits of any Army decision. The jury instead would be asked whether KBR and Irvine exercised ordinary care under the circumstances.

Juries in negligence actions routinely consider as evidence circumstances of which they do not review the merits. For example, in a case where a wreck occurs in the rain, the defendant may argue that the rain was a supervening cause of the wreck. The jury does not review whether it should have been raining that day; it instead determines whether the driver acted as a reasonably prudent person driving in the rain. As an example more analogous to this case, in a case where a wreck occurs in an intersection, the defendant may contend that the proximate cause of the wreck was the negligent design of the intersection. The municipality may be immune from suit for its design choices just as the Army here would be immune from suit for its route selection. But the jury in that case could still consider whether the design of the intersection - as part of the circumstances then existing - was a supervening cause of the wreck, just as the jury here could consider whether military decisions were supervening causes of Irvine running off the road. Neither of those scenarios requires the jury to review or reexamine those circumstances.

The political question doctrine was developed to "prevent the judicial branch from deciding 'political questions,' controversies that revolve around policy choices and value determinations constitutionally committed for resolution to the legislative or executive branches." *Aktepe v. United States*, 105 F.3d 1400, 1402 (11th Cir. 1997) (*citing Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 230, 106 S. Ct. 2860 (1986)). It does not prevent the introduction into evidence of political decisions.

In other cases where courts dismissed a plaintiff's negligence claims pursuant to the political question doctrine, the plaintiff challenged decisions made by the political branches, which required a reexamination of those decisions. For example, in *Aktepe v. United States*, 105 F.3d 1400 (11th Cir. 1997), the plaintiffs were members of the Turkish Navy who were injured during military exercises when their ship was struck by missiles fired from a U.S. ship. The suit was against the U.S. military, questioning military decisions. The Eleventh Circuit properly held that the case was nonjusticiable because it would require the Court to decide political questions, such as how a reasonably prudent military force would conduct a training exercise.

The *Aktepe* decision is readily distinguishable from the present case. First, *Aktepe* was a suit directly against the Navy, not a civilian for-profit contractor. Second, *Aktepe* involved two nations engaged in a NATO military exercise and dealt with the relationship between the United States and its allies, which is a matter of foreign policy. *Id.* at 1403. Third, there were no judicially discoverable and manageable standards for resolving the dispute because a court is

not equipped to determine how a reasonably prudent military force would conduct the exercise. *Id.* at 1404. Fourth, the case would require the Court to make an initial policy decision of a kind reserved for military discretion. As an example, the Court stated, it would be unable to conclude that the Navy behaved negligently when it decided not to advise the missile team that the firing was a drill, without making a policy determination regarding the necessity of simulating actual battle conditions. *Id.* Fifth, "adjudicating the case would express a lack of respect for the political branches of government by subjecting their discretionary military and foreign policy decisions to judicial scrutiny ...." *Id.* The present case would not require the court or jury to answer any similar question. This case would require the jury only to decide whether Irvine acted reasonably under the circumstances, or whether KBR negligently hired or retained Irvine, a decision made before Irvine ever left the United States.

Another case that provides a clear example of the type of dispute the political question doctrine bars from courts is *Tiffany v. United States,* 931 F.2d 271 (4th Cir. 1991). There, the plaintiff filed suit against the United States alleging that the military negligently intercepted and collided with the plaintiff's decedent's aircraft, causing his death. The Fourth Circuit rightly held that negligence standards could not be applied to the military's defense of our national borders or airspace. The Court stated that "whether and under what circumstances to employ military force are decisions left to the executive and legislative branches of government." *Tiffany,* 931 F.2d at 277. In other words, it would be improper for the court to

attempt to decide what is a reasonably prudent intercept.

Plaintiffs here question decisions made by KBR and its employee Irvine, not decisions made by the military. Defendants seek to use their causation defenses to bootstrap a political question into the case in order to avoid responsibility. As it now stands, the United States taxpayers will pay for Sgt. Carmichael's care even though a private for-profit contractor negligently caused his injuries. This case only involves Plaintiffs' allegations regarding the manner in which Defendants carried out their duties and does not require any adjudication of the reasonableness of any decision made by the military.

III. THERE ARE JUDICIALLY DISCOVERABLE AND MANAGEABLE STANDARDS FOR RESOLVING THE CASE.

The Eleventh Circuit also held that there are no judicially discoverable and manageable standards for determining what a reasonable driver would do in a military convoy in Iraq. It should be well within the federal court's ability to apply negligence standards to a truck wreck, even one in Iraq. In fact, Defendant Irvine admits his driving was governed by the Federal Motor Common Carrier Regulations, which are very clear and manageable standards, and that it was his ultimate responsibility to safely negotiate the curve.

The determination a jury would make here is no more difficult than decisions juries make everyday. As an example, in neurosurgical malpractice cases juries have to determine what a reasonably prudent

neurosurgeon would do during brain surgery. Juries also sit in judgment in complex tax cases and complex contract cases. The jury's task here would be much easier than in those examples. It may be novel for a jury to determine standard of care for a driver on a fuel convoy in Iraq, but it is not unmanageable.

IV. THE DISSENT BELOW CORRECTLY STATED THAT PETITIONERS' NEGLIGENT SUPERVISION CLAIM WOULD NOT REQUIRE THE REEXAMINATION OF A MILITARY DECISION.

The dissent below noted that "Plaintiffs have sufficiently alleged a claim of negligent supervision based on their allegation that KBR breached the requisite duty of care by requiring [Irvine] to work unreasonably long hours, causing driver fatigue, which was a proximate cause of the injury." Pet. App. 48a. The dissent contended that KBR's liability for negligently allowing Irvine to become physically unfit to operate his truck could be submitted to a jury without implicating any military decision. Pet. App. 50a. The dissent argued that evidence that Irvine exceeded the allowable hours under the Federal Motor Carrier Safety Administration regulations raised a genuine issue of material fact as to whether driver fatigue was a contributing cause of the accident. Pet. App. 54a. Because deciding this issue would go to the merits of Plaintiffs' claim, the dissent correctly stated, the district court was required to find that jurisdiction exists and give Plaintiffs an opportunity to argue the merits of the claim to a finder of fact, at least under this theory. Pet. App. 54a-55a.

There is no evidence the military exercised any control over Irvine's hiring or work schedule. Irvine's time cards indicate that he worked an extraordinary number of hours in the weeks leading up to the rollover. Irvine was sixty-six years old on the date of the crash, and his time cards indicated that he worked 12 hour days for the week of May 9 through May 13. (R3-98-191). Although Irvine claimed that a lot of time on the card was probably bunker time at night, he submitted a time card to KBR for 99.5 hours of pay that week. *Id.* For the week of the incident, Irvine's time cards show he worked a total of 86 hours, and on the day of the wreck, he worked another 12 hours. (R3-98-192-93). Irvine's work schedule and oversight of his hours of service were all within the exclusive control of Defendant KBR.

There is no evidence that the military controlled Irvine's work hours or chose specific drivers for convoys. A jury could consider whether these actions by KBR were negligent and caused the accident, without reexamining any decision made by the military.

In short, this case in no way interferes in the business of the executive branch or in any way infringes on the separation of powers. Instead, it is only a personal injury suit against a private contractor for an automobile wreck.

CONCLUSION

This Court should grant the petition and exercise its jurisdiction.

Respectfully submitted,

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Dated: December 9, 2009

APPENDIX

APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 08-14487

D. C. Docket No. 06-00507-CV-TCB-1

[Filed June 30, 2009]

ANNETTE CARMICHAEL, Individually and as Guardian for Keith Carmichael, KEITH CARMICHAEL, an incapacitated adult,	)
Plaintiffs-Appellants,	)
versus	)
KELLOGG, BROWN & ROOT SERVICE, INC., HALLIBURTON ENERGY SERVICES INC., et al.,	)
Defendants-Appellees.	)

Appeal from the United States District Court
for the Northern District of Georgia

(June 30, 2009)

Before MARCUS, KRAVITCH, and ANDERSON, Circuit Judges.

MARCUS, Circuit Judge:

At issue today is whether the district court erred in dismissing the plaintiff's negligence suit arising out of an accident in which her husband, a sergeant in the United States Army, was severely injured in May 2004 while serving as an armed escort for a large military convoy traveling through a war zone in Iraq. The district court held that the suit was non-justiciable on political question grounds and dismissed the case for lack of subject-matter jurisdiction. On appeal, the plaintiff contends that the suit does not implicate the political question doctrine because a civilian contractor, and not the military, was responsible for the accident.

After thorough review, we conclude that adjudicating the plaintiff's claims would require extensive reexamination and second-guessing of many sensitive judgments surrounding the conduct of a military convoy in war time -- including its timing, size, configurations, speed, and force protection. In addition, we can discern no judicially manageable standards for resolving the plaintiff's claims. Accordingly, we hold that the political question doctrine bars the plaintiff's suit, and we affirm the district court's dismissal for lack of subject-matter jurisdiction.

I. BACKGROUND

A. Factual Background

The tragic accident at the center of this case occurred on May 22, 2004 during a military operation in Iraq. On that day, a military convoy of vehicles had been organized to transport JP-8 fuel from Camp Anaconda, a military base near the town of Balad, Iraq, roughly 45 miles north of Baghdad, to Al Asad, the second largest American air base in Iraq, located in Anbar province, approximately 100 miles west of Baghdad. [Brocket Dep. 126:9-13; Hansen Decl. ¶ 5]. The fuel was carried in tanker trucks operated by Kellogg, Brown & Root Services, Inc. ("KBR") and Halliburton Energy Services, Inc. ("Halliburton"),[1] civilian corporations that had entered into a contract with the United States Military in 2001 to provide logistical services in connection with its conduct of the war in Iraq.[2]

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[1] See Contract No. DAAA09-02-D-0007. KBR was a subsidiary of Halliburton until 2007, at which time KBR became an independent corporation. For purposes of this discussion, unless otherwise indicated, references to KBR are meant to include both corporate defendants.

[2] The agreement was made pursuant to the military's Logistics Civil Augmentation Program ("LOGCAP"). U.S. Army Reg. 700-137. Initiated in 1985, LOGCAP allows "civilian contractors to perform selected services in wartime to augment Army forces," thereby "releas[ing] military units for other missions or [to] fill shortfalls." Id. at 1-1.

LOGCAP regulations define the general contours of the military's relationship with civilian contractors. The specific

These convoy missions were highly dangerous: they unavoidably involved traveling through war zones, frequently exposing them to insurgent attacks in the form of improvised explosive devices ("IEDs"), small-arms fire, as well as shelling and rocket attacks. [Brocket Dep. 111:3-10]. Indeed, in the two months prior to the May 22 convoy, insurgent attacks had become so severe that convoy missions had been temporarily suspended. [Brocket Dep. 109-12.] As a result, military bases faced fuel shortages, requiring many of them to begin depleting their reserves. [Brocket Dep. 112:5-19]. In light of the urgent need for fuel, the military decided to proceed with the convoy despite the many risks.

Given the inherent dangerousness of these missions, the convoys were heavily militarized. Thus, military gun trucks and Humvees were interspersed among the KBR-operated fuel tankers in convoys.

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nature of the military's relationship with KBR was further governed by a patchwork of other agreements and instruments. Thus, for example, the Army Field Manual contains numerous regulations specifically addressing the relationship between the military and civilian contractors such as KBR whose role, like KBR's, includes participation in military convoys, see AFM 55-30 ("Army Motor Transport Units and Operations"), or accompanying the military in battlefield operations, see AFM 3-100.21 ("Contractors on the Battlefield"). Additional regulations are to be found in various Department of Defense Instructions. See, e.g., DoDI 3020.41 "Contractor Personnel Authorized to Accompany the U.S. Armed Forces." Finally, the individual LOGCAP contract between the military and KBR -- along with the Statements of Work (SOW) and Task Orders (TO) by which the contract is implemented -- contain still further provisions that clarify the parties' respective duties and responsibilities.

[Brocket Dep. 129: 15-24]. In addition, military escorts such as Sergeant Carmichael, were assigned to ride in the tanker trucks. [Tucker Decl. ¶ 10].

The missions were led by a military convoy commander, or "C-2," in accordance with strict military regulations.[3] We discuss these regulations in more detail below. For present purposes, it suffices to note that, as the district court found, the regulations give the military "plenary control" over convoys such as the one at issue here. Carmichael v. Kellogg, Brown & Root Services, Inc., 564 F. Supp. 2d 1363, 1368 (N.D. Ga. 2008) ("Carmichael II").[4] Thus, for example, it is the military, not civilian contractors, that decides when convoys are to be arranged, the routes to be traveled, the amount of fuel or other supplies to be transported, the speed at which the vehicles are to travel, the number of vehicles to be included in the

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[3] In addition to the military convoy commander, KBR received additional information and briefing from a KBR convoy commander, who also traveled in the convoy.

[4] Army Regulation 715-9 provides that "contractor employees will be expected to adhere to all guidance and obey all instructions and general orders issued by the Theater Commander." Army Reg. 719-5 at 3-2(f). In the event that military orders are violated, Regulation 715-9 gives the military the authority to "limit access to facilities and/or revoke any special status a contractor employee has as an individual accompanying the force," and, indeed, to "demand that the contractor replace the individual." Id.; see also Task Order 59, DE #94 at 00021 ("[KBR] is permitted to deploy its own personnel with prior approval of the Government and will comply with all deployment requirements for the specific Area of Operations. The contractor shall be responsible for compliance with all requirements and guidance found in the 'Contractor Deployment Guide.'").

convoy, the spacing to be maintained between the vehicles, and the security measures to be employed, and other details of the mission.[5]

Prior to departing on May 22, 2004, the military convoy commander informed those participating in the convoy of these and other details concerning the mission. The speed of the convoy was set by the military convoy commander at between 50 and 60 miles per hour, and drivers were instructed to maintain a distance of 100 meters between their vehicles and the vehicles in front of them. Indeed, each vehicle was instructed to follow in the tire tracks of the vehicle ahead of it. Moreover, the military commander explained that the mission was to travel along a roadway referred to as "ASR Phoenix." The route was

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[5] In fact, the Army Field Manual sets forth instructions governing virtually every imaginable aspect of convoy operations, including the responsibilities of the advance/quartering party (i.e., parties in charge of coordinating convoys' arrivals at their destinations); convoy control personnel; start points and release points; "halts" (when the convoy stops for rest, personal comfort and relief, messing, refueling, maintenance, etc.); inspection of equipment, schedule adjustments; gaps and march rate; submission of movement bids (a request for clearance to move on a controlled route); communications; route reconnaissance; necessary escort and security measures. See FM 55-30 at 5-1 to 5-7. For example, FM 55-30 describes in detail the duties of the various personnel who participate in convoys (commander, platoon leader, truckmaster, etc.), id. at 2-1 to 2-7; various aspects of the "operational environment" (e.g., geography, terrain, weather, infrastructures, and threats) and the measures that should be taken under various circumstances; organization, id. at 3-4 to 3-5; vehicle placement, planning, id. at 5-1; maintenance, id. at 9-1, 9-2; defensive tactics for scenarios running from air attacks to nuclear attacks, id. at 6-1 to 6-5.

dreaded by convoy drivers: it was difficult to navigate because of its serpentine path and the poor quality of its surface, and additionally, was the site of frequent insurgent attacks, some of which had resulted in both military and KBR casualties. [Hansen Decl. ¶ 6; Gardner Dep. 35-37 (noting tension among employees resulting from an attack on a convoy roughly one month before Irvine's accident); cf. Lane v. Halliburton, 529 F.3d 548, 555 (5th Cir. 2008) (describing claims by KBR truck drivers who alleged that KBR failed to inform them that the convoys in which they were to travel were "subject to a very high risk of insurgent attack")]. In fact, the convoy's departure on that morning was delayed because an IED had been discovered by a previous convoy and had to be detonated. [Brocket Dep. 19:3-15]. Although plagued with these dangers, the military nonetheless chose ASR Phoenix because it was safer than alterative routes, which, for example, would have required the convoy to travel through Baghdad's industrial district, a particularly dangerous route. [Stonebraker Dep. 147:18-24].

On the day of the accident, the convoy left Camp Anaconda between 7:00 a.m. and 9:00 a.m. The procession included roughly fifteen tankers. [Irvine Dep. 82:13-21]. Given the threat level, the military had recently limited the number of commercial vehicles to fifteen per convoy. [Lange Dep. 22:21-25]. Like most convoys, the May 22 convoy was heavily militarized. Interspersed between the tankers were approximately seven military gun trucks. [Brocket Dep. 129:17-24]. The vehicles followed in a single-file line behind the military convoy commander. The sixth tanker was

driven by David Irvine.[6] [Irvine Dep. 82:18]. Hired by KBR in April 2004, this was approximately Irvine's fifth or sixth convoy, Irvine Dep. 72:21, and he had traveled this particular route on approximately three previous occasions.[7] Irvine's truck was carrying the maximum load, approximately 8,000 gallons of fuel, weighing roughly 80,000 pounds. Irvine Dep. 88:3-89:17. The military commander assigned Sergeant Carmichael as a military escort -- or a "shooter," as they are called -- to ride in Irvine's vehicle.

After traveling for several hours, the convoy approached ASR Phoenix's first set of dangerous "S-curves." The military gun truck at the head of the convoy alerted the other vehicles via radio that the curves lay ahead. Each of the vehicles traveling ahead of Irvine's successfully negotiated the turns. Irvine made it through the first curve of the S, but as he turned to enter the second curve, the tanker's rear end veered off the road, eventually causing the vehicle to roll over.

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[6] There is some ambiguity in the record concerning Irvine's place in the convoy. This is because different witnesses counted the position differently depending on whether their counts included only KBR vehicles, or included military vehicles as well. [See, e.g., Brocket Dep. 44:21-45:5].

[7] Irvine first applied for a job with KBR in January 2004, but was turned down after he failed a medical exam due to "erratic" blood pressure. He began taking medication for the condition, and after reapplying a few months later, was hired by KBR to operate the tractor-trailers used by the military to transport fuel for its operations in Iraq. He was sixty-six years old when he was hired. [Irvine Dep. 6:8-9].

After the accident, Irvine was found in the truck, dangling from his seat belt without having sustained serious injury. However, Sergeant Carmichael was thrown from the vehicle and partially pinned beneath it. Rescuers were able to dislodge Sergeant Carmichael after roughly six or seven minutes, and both he and Irvine were subsequently evacuated from the scene by medical personnel. Tragically, Sergeant Carmichael had suffered severe brain injuries due to a lack of oxygen. He has remained in a permanent vegetative state ever since.

Due to the accident, the convoy was halted for roughly ninety minutes. During that time, the convoy encountered no hostile activity. Pursuant to military regulations, the overturned vehicle was set afire and destroyed. The remaining vehicles continued on to Al Asad. Notably, later on in the journey, an IED damaged one of the vehicles and injured a KBR employee. [Brocket Dep. 125:4-13].[8]

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[8] After the accident, KBR convened a Post Accident Review Board to investigate the events leading up to the rollover. The Board found that the "rollover incident resulted from Irvine traveling at an excessive speed while negotiating a curve [and] not paying attention to surroundings." Initially, the Board recommended that Irvine be allowed to return to driving tankers after a brief suspension. However, a KBR Deputy Project Manager concluded that stricter discipline was warranted and ordered that Irvine be permanently removed from driving duties. Another report submitted by a KBR transportation foreman determined that the cause of the accident was Irvine's failure to control the vehicle.

B. Procedural History

On February 1, 2006, Sergeant Carmichael's wife filed suit, individually, and as her husband's guardian, against KBR, Halliburton, and Irvine in Georgia state court. The complaint asserted that Irvine had been negligent in, among other things, traveling at an excessive speed under the circumstances, failing to keep a proper lookout, and in failing to inspect his vehicle before operating it. In addition, the complaint sought to hold KBR and Halliburton liable for Irvine's negligence under the doctrine of respondeat superior. Finally, the complaint alleged that KBR was liable for negligent hiring, supervision, training, and retention, as well as for negligently entrusting the vehicle to Irvine, and for "all other acts of negligence as may be shown at trial." Compl. ¶ 25.

In March 2006, KBR removed the case to the United States District Court for the Northern District of Georgia, and filed a motion to dismiss based, inter alia, on the political question doctrine. The district court denied the motion, concluding that it was too soon to tell whether the suit would raise political questions. Carmichael v. Kellogg, Brown & Root Services, Inc., 450 F. Supp. 2d 1373, 1381 (N.D. Ga. 2006) ("Carmichael I").

After completion of discovery, KBR again moved to dismiss on political question grounds. The district court carefully examined all of the evidence and, this time, concluded that the suit raised political questions. Carmichael II, 564 F. Supp. 2d at 1372. Specifically, the district court concluded that since "the army did in fact control every aspect of the organization, planning and execution of the convoy in question . . . the conduct

of the military and its handling of supply convoys used to support military operations would necessarily be questioned were this case allowed to go forward." Id. at 1368. In addition, the court determined that given the highly unusual circumstances under which the accident occurred -- particularly, the fact that the "rollover took place on a route notorious for lethal insurgent activity while Irvine helped to transport jet fuel from one military camp to another as part of [a] convoy" -- there were "no judicially discoverable and manageable standards for resolving Plaintiffs claims." Id. at 1371. Accordingly, the district court concluded that the suit presented political questions over which it could not exercise jurisdiction, and dismissed the suit for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Id. at 1372.

II. DISCUSSION

A. Standard of Review

Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction can be asserted on either facial or factual grounds. Morrison v. Amway Corp., 323 F.3d 920, 925 n.5 (11th Cir. 2003). Facial challenges to subject matter jurisdiction are based solely on the allegations in the complaint. When considering such challenges, the court must, as with a Rule 12(b)(6) motion, take the complaint's allegations as true. Id. However, where a defendant raises a factual attack on subject matter jurisdiction, the district court may consider extrinsic evidence such as deposition testimony and affidavits. Id. KBR's renewed Rule 12(b)(1) motion specifically appealed to jurisdictional evidence obtained during discovery. As a result, the

district court correctly observed that it was free to weigh the facts and was not constrained to view them in the light most favorable to Carmichael. Carmichael II, 564 F. Supp. 2d at 1365.

We review the district court's legal conclusions de novo and its factual findings for clear error. Lawrence v. Dunbar, 919 F.2d 1525, 1530 (11th Cir. 1990) ("The usual standard of reviewing a district court's findings of jurisdictional facts is the clearly erroneous standard."); see also Aurecchione v. Schoolman Transp. Sys., Inc., 426 F.3d 635, 638 (2d Cir. 2005). As we have repeatedly held, the "clearly erroneous" standard is highly deferential. See, e.g., Renteria-Marin v. Ag-Mart Produce, Inc., 537 F.3d 1321, 1324 (11th Cir. 2008). On review for clear error, the district court's determination must be affirmed "so long as it is plausible in light of the record viewed in its entirety." Merrill Stevens Dry Dock Co. v. M/V YEOCOMICO II, 329 F.3d 809, 816 (11th Cir. 2003) (quotation marks omitted); see also University of Georgia Athletic Ass'n v. Laite, 756 F.2d 1535, 1543 (11th Cir. 1985) ("While the 'clearly erroneous' standard of review is less stringent than the well-known sports rule, 'The referee is always right,' it nevertheless presents a formidable challenge to appellants who . . . seek to overturn the factual findings of a district court.").

B. The Political Question Doctrine

The political question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls

of Congress or the confines of the Executive Branch." Japan Whaling Ass'n v. American Cetacean Soc., 478 U.S. 221, 230 (1986). Political questions "have been held to be nonjusticiable and therefore not a 'case or controversy' as defined by Article III." Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard Tanker Dauntless Colocotronis, 577 F.2d 1196, 1203 (5th Cir. 1978); see also Massachusetts v. E.P.A., 549 U.S. 497, 516 (2007) ("It is therefore familiar learning that no justiciable 'controversy' exists when parties seek adjudication of a political question[.]"); Made in the USA Found. v. United States, 242 F.3d 1300, 1312 (11th Cir. 2001) ("The political question doctrine emerges out of Article III's case or controversy requirement and has its roots in separation of powers concerns.").

In Baker v. Carr, 369 U.S. 186 (1962), the Supreme Court outlined a familiar list of factors to be used in determining whether a dispute raises a non-justiciable political question. Specifically, under Baker a case may be dismissed on political question grounds only if at least one of the following characteristics is present:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] a lack of judicially discoverable and manageable standards for resolving it; [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] an unusual need for unquestioning adherence to a political decision

> already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Aktepe v. United States, 105 F.3d 1400, 1402-03 (11th Cir. 1997).

Here, the district court found that both the first and second Baker factors applied to Carmichael's suit. Specifically, the court determined that adjudicating the dispute would require reexamination of the type of sensitive military judgments and decisions typically insulated from judicial review and that it was without judicially manageable standards for doing so. We examine each of these issues separately and conclude that the district court was correct in reaching both conclusions.

C. A Textually Demonstrable Constitutional Commitment to a Coordinate Political Department

1.

Under Baker's first factor, a political question is raised when a suit requires reexamination of issues entrusted by the Constitution's text to a coordinate political department. Baker, 369 U.S. at 217. "This factor recognizes that, under the separation of powers, certain decisions have been exclusively committed to the legislative and executive branches of the federal government, and are therefore not subject to judicial review." McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1358-59 (11th Cir. 2007). There can be little doubt that military judgments generally fall into this

category. Article I of the United States Constitution gives Congress the power to declare war and to provide for, organize, arm, maintain, and govern the military. U.S. Const. art. I, § 8, cls. 11-16. Likewise, Article II of the Constitution makes the President the Commander-in-Chief of the armed forces. U.S. Const. art. II, § 2; see also McMahon, 502 F.3d at 1359 (noting that "the text of the Constitution explicitly invests the political branches with authority over the military"); Aktepe, 105 F.3d at 1403 ("The Constitution emphatically confers authority over the military upon the executive and legislative branches of government.").

This is not to say that all cases involving the military are automatically foreclosed by the political question doctrine. See, e.g., McMahon, 502 F.3d at 1358 ("Nevertheless, it is clear that not even military judgments are completely immune from judicial review."); see also Gilligan v. Morgan, 413 U.S. 1, 11-12 (1973) ("[W]e neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law for specific unlawful conduct by military personnel."). Rather, determining whether the doctrine applies requires a "discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action." Baker, 369 U.S. at 211-12. The court "must analyze [an] appellant's claim as it would be tried, to determine whether a political question will emerge." Occidental, 577 F.2d at 1201-02.

The district court in this case concluded that Carmichael's suit would require reexamination of many sensitive judgments and decisions entrusted to the military in a time of war. We agree. As we have recounted, military judgments governed the planning and execution of virtually every aspect of the convoy in which Sergeant Carmichael was injured. At the broadest level, these include the military's decision to utilize civilian contractors in conducting the war in Iraq, and its decision to use the contractors specifically in connection with fuel-transportation missions such as the one at issue here. The rollover in which Sergeant Carmichael was injured never would have taken place if these basic decisions had not been made.

Moreover, and more precisely in relation to the May 22, 2004 convoy, the military decided the particular date and time for the convoy's departure; the speed at which the convoy was to travel; the decision to travel along a particular route (ASR Phoenix); how much fuel was to be transported; the number of trucks necessary for the task; the speed at which the vehicles would travel; the distance to be maintained between vehicles; and the security measures that were to be taken. Each of these critical determinations was made exclusively by the military. [Culver Decl. ¶ 10. ("Under the SOW in Task Orders 43 and 59, the Army exclusively decided whether, when, and along what route to deploy a convoy, as well as determining the speed of the convoy, the distance between convoy vehicles, and all other conduct intended to avoid danger and minimize risks.") (emphasis added); see also Holm Decl. ¶ 7 (citing Army Field Manual 55-30 and averring that the "Army is responsible for all aspects of the control, organization, and planning of supply convoy operations") (emphasis added); Hansen Decl. ¶ 10; see

generally Army Reg. 715-9 (establishing "Department of the Army policies, responsibilities, and procedures for using contractors on the battlefield, and specifically addresses planning for acquiring and administering commercial support services on the battlefield")].

Furthermore, each of these decisions required the specific exercise of military expertise and judgment. This comes sharply into view when we consider the circumstances surrounding the May 22, 2004 mission. As the district court found, ASR Phoenix was a particularly treacherous roadway: it was narrow, ridden with potholes, marked by numerous curves, and, most of all, was a favored target of insurgent activity. Carmichael II, 564 F. Supp. 2d at 1370. [see also Holm Decl. ¶ 9 ("ASR Phoenix, like most convoy routes, is very narrow, has a poorly maintained road surface, and has numerous potholes and other damage from IEDs and other munitions. The Army uses such roads because there are either no better alternative routes or because the threat conditions on alternative routes render them unsafe for convoy passage.")].

In the face of these difficult military conditions, traveling on ASR Phoenix called for delicately-calibrated decisions based on military judgment, experience, and intelligence-gathering. Thus, in making the judgment to organize the convoy in the first place, it was necessary for the military to calibrate the risks associated with the mission and to balance those risks against its basic need for fuel. Army regulations make clear that the decision to use civilian contractors instead of military personnel for particular tasks calls for delicate balancing of considerations such as risk and efficiency. See, e.g., Army Reg. 700-137 at 2-4 ("The use of civilian

contractors versus U.S. military personnel involves a higher degree of risk. Contractor employees have supported the Army in overseas locations during previous crises and can provide continued support in the future. However, their performance cannot be accurately predicted. [Commanders] must evaluate each function, define the acceptable degree of risk, and balance its military and contractor support mix accordingly.").

Moreover, once the decision to conduct the convoy had been made, the military made numerous notable tactical determinations concerning how the mission could most safely be executed. A balance had to be struck so that the vehicles would be traveling swiftly enough to frustrate potential insurgent attacks, but not so fast that drivers would be unable to control their vehicles on the narrow, wandering, poorly-maintained road. Similarly, as the district court observed, it was necessary for the vehicles to maintain enough distance between one another to avoid becoming a condensed target for insurgent attacks, but not so far apart as to lose artillery cover. Carmichael II, 564 F. Supp. 2d at 1370. There is not the slightest hint in the record suggesting that KBR played even the most minor role in making any of these essential decisions.

Because the circumstances under which the accident took place were so thoroughly pervaded by military judgments and decisions, it would be impossible to make any determination regarding Irvine's or KBR's negligence without bringing those essential military judgments and decisions under searching judicial scrutiny. Yet it is precisely this kind of scrutiny that the political question doctrine forbids.

The district court properly found that Carmichael's suit is non-justiciable.

2.

Carmichael advances several arguments in an attempt to forestall this conclusion. First, she claims, despite overwhelming evidence to the contrary, that it was in fact KBR, and not the military, that exercised control over the convoy. In support of this contention, she cites a document she refers to as KBR's "Convoy Commander Book for Camp Anaconda." According to Carmichael, the book states that the KBR Convoy Commander, not the military convoy commander, exercises "main control" over the convoy. [Blue Br. at 5 n.1].

This argument is a non-starter, however, because the "Commander Book" is not part of the record. In ruling on KBR's renewed motion to dismiss, the district court refused to consider the book because it had not been properly authenticated. Carmichael II, 564 F. Supp. 2d at 1370. Carmichael insists that the district court erred in excluding the book, claiming that the document had been authenticated by the deposition testimony of Robert Stonebraker, a KBR Convoy Commander. Yet Carmichael fails to cite any specific portion of Stonebraker's testimony in support of this claim. Indeed, she raises the issue of authentication only briefly and in a footnote to her brief on appeal. Because she has failed to develop the argument or to offer any citation to the record in support of it, we deem the argument waived. Greenbriar, Ltd. v. City of Alabaster, 881 F.2d 1570,

1573 n.6 (11th Cir. 1989) (issue waived because insufficiently developed in briefs on appeal).[9]

In any event, the notion that KBR exercised any significant control over military convoys -- let alone "main" control -- is completely implausible in light of the mountain of evidence to the contrary. [See, e.g., Carmichael II, 564 F. Supp. 2d at 1369 n.6; Shack Dep. 68:15-18; Brocket Dep. 128:22-25; cf. Whitaker v. Kellogg Brown & Root, Inc., 444 F. Supp. 2d 1277, 1278-79 (M.D. Ga. 2006)]. The military regulations make abundantly clear that KBR was answerable to the military, and was expected to abide by military orders, policies, and requirements. See Army Reg. 715-9 at 3-2(f) (stating that contractor employees are "not under the direct supervision of military personnel in the chain of command," but that the "contracting officer . . . or [his] designated liaison . . . is responsible for monitoring and implementing contractor performance requirements"). In the event that military orders are violated, Regulation 715-9 gives the military the authority to "limit access to facilities and/or revoke any special status a contractor employee

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[9] But, even if we were to consider the book, it would provide Carmichael with precious little help. The commander "book" is in fact a ten-page document that more resembles an outline, consisting mostly of headings and bullet points, than a formal manual of any sort. It is true that in one place (under the heading "Convoy Control Personnel"), the document states: "The main control is exercised by the convoy commander." [DE #97, Ex. 16 at 6.] However, this statement is much too cryptic -- particularly in light of the elliptical nature of the commander book as a whole -- to provide any evidence of KBR's control over the convoys. Indeed, it is not even clear whether the sentence in question refers to KBR's or the military's convoy commanders.

has as an individual accompanying the force," and to "demand that the contractor replace the individual." Id.; [see also Task Order 59, DE #94, Ex. 5 at 00021 ("[KBR] is permitted to deploy its own personnel with prior approval from the Government and will comply with all deployment requirements for the specific Area of Operations. The contractor shall be responsible for compliance with all requirements and guidance found in . . . [the] 'Contractor Deployment Guide.'")].

The testimony of both Army and KBR personnel also leaves no doubt that both parties understood fully the military's complete control over military convoys. [See, e.g., Hansen Decl. ¶ 10 ("The military convoy commander was in total command and control of the convoy, including setting the speed at which the convoy traveled. The military convoy commander had the sole authority to initiate tactical measures relating to the convoy, including adjusting the convoy speed[.]"); Shack Dep. 68:15-18 (testifying that "it was very clear to everybody and everybody at KBR that the military -- and still is -- that the military is in charge of all convoys outside the wire."); Brocket Dep. 128:22-25 ("[E]very move, everything we do from the point that we link up with the military and we began this mission, everything we do is dictated by the military C-2 [i.e. military convoy commander.]")].

In addition to the commander book, Carmichael cites various statements in the record in an attempt to support her claim that it was KBR, not the military, that ultimately had control over the convoy. For example, she emphasizes the fact that Irvine and other KBR drivers took their orders from the KBR convoy commander instead of the military convoy commander. But the fact that the military's orders were

communicated through KBR does not mean that KBR had any authority over the convoy; it simply shows that, rather than giving orders directly to Irvine and other drivers, the military transmitted its orders by using KBR's management as a conduit. Nor do we find relevant Carmichael's claim that KBR's commanders occasionally gave military drivers instructions about what road to take or where to turn. Even if true, this does not suggest that KBR made any decisions about the route that convoys were to take; the speed; or the convoy configuration. At most, it shows only that KBR sometimes helped drivers carry out the directions that had been decided upon by the military.

Carmichael also claims that it was Irvine, not the military, who ultimately controlled his vehicle. She argues, for example, that regardless of what the military regulations might have required, Irvine was responsible for steering the vehicle and controlling its speed. If he had wished, Carmichael claims, Irvine could have slowed down, or even come to a stop, as he approached the S-curve.[10] But this argument amounts to little more than a play on the words "control" and

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[10] In a similar vein, Carmichael points out that "there is nothing the military does to lock in the speed of each individual truck." [Blue Br. at 7]. Precisely what is meant by "locking in" here is not entirely clear, but the underlying claim is apparent: it was individual drivers such as Irvine, not the military, who had control over the vehicles in the convoy. As we have explained, that Irvine had "control" over his vehicle in this sense is beside the point. The fact remains that Irvine's conduct was at all times governed by military rules and regulations (including timing, route, speed, and spacing), and any attempt to assess the reasonableness of Irvine's conduct would entail an examination of those rules and regulations.

"responsibility." The fact that Irvine had physical control over his tanker does not change the fact that he was operating at all times under orders and determinations made by the military. To be sure, Irvine could have flouted the military's orders; but to have done so would have been to risk disruption of the entire convoy. Indeed, any defense mounted by KBR or Irvine would undoubtedly cite the military's orders as the reason why Irvine did not reduce his speed.

In short, we are not persuaded by Carmichael's claims that the political question doctrine does not apply here because of the fact that KBR or Irvine, and not the military, were somehow in control of the convoy or the individual vehicles within it.

3.

Taking a slightly different tack, Carmichael argues next that even if her suit in some way implicates military judgments, no political question problem arises because adjudicating the case would not require the court to review any of those military judgments. According to Carmichael, this is because the record clearly establishes that Irvine's negligence alone caused the accident. Thus, for example, she notes that Irvine's was the only vehicle in the convoy to have rolled over. She also makes much of the fact that KBR's subsequent investigation points to Irvine alone as the cause of the accident. In addition, Carmichael cites Irvine's time cards, which show, she claims, that Irvine worked in excess of eighty hours per week in the weeks leading up to the accident, suggesting that overwork or fatigue might have affected Irvine's judgment or ability to drive safely.

We remain unpersuaded. To begin with, even if we were to assume that all of Carmichael's assertions on this point are true, Carmichael has not come close to showing that Irvine alone was responsible for the accident. The fact that KBR's investigation mentions only Irvine's conduct does not establish that Irvine was the sole cause of the accident. The record does not indicate anything about the quality or thoroughness of KBR's investigation.[11] And even if KBR had found evidence strongly suggesting that military decisions played a causal role in the accident, KBR might nonetheless have opted against implicating the military for ulterior reasons.

Likewise, we find little significance in the fact that Irvine's was the only vehicle involved in the accident. Carmichael argues that since all convoy drivers were instructed to follow exactly the same path, and since none of the vehicles ahead of Irvine crashed, Irvine should not have crashed if he had been driving as instructed. We find this argument much too facile. Given the multiple hazards present -- e.g., ASR Phoenix's dilapidated condition, the presence of oil slicks,[12] and the speed set by the military commander

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[11] Similarly, we are unimpressed by Irvine's failure to blame the military for the accident. We have no reason for thinking that Irvine's judgment should be considered authoritative; and even if Irvine were correct in placing no blame on the military, it does not follow that either he or KBR must be blamed. It would be entirely plausible on this record for a jury to conclude that no one was at fault for the accident.

[12] The district court found that ASR Phoenix "often harbored oil slicks." Carmichael II, 564 F. Supp. 2d at 1370. The record contains conflicting evidence concerning the existence of oil slicks

-- the rollover might have been caused by any number of factors entirely beyond Irvine's control.

Furthermore, Carmichael's reliance on Irvine's time cards is misplaced. During his deposition, Irvine clarified that the time cards reflected twelve hours of pay each day, not twelve hours of work. [Irvine Dep. 191:17-19]. He explained that the twelve hours included "probably a lot of bunker time at night." [Irvine Dep. 191:15-16]. Moreover, Irvine testified that much of his work consisted of tasks such as helping unload mail and washing his boss's car. [Irvine Dep. 282:19-25]. He estimated that only twenty of the hours indicated on his time card had been spent driving in a convoy that week. [Irvine Dep. 282:11-14]. The figures shown on Irvine's time cards do not establish whether Irvine was exhausted at the time of the May 22 convoy, and do not explain what role, if any, that purported exhaustion might have played in the accident.

Finally, even assuming that Irvine bore some blame for the accident, none of the facts cited by Carmichael shows that Irvine would be the only party to blame. It remains perfectly plausible that the speed at which the convoy was traveling (to take just one factor), along a dangerous route chosen solely by the military, would have contributed to the rollover.

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on the road. While some witnesses testified that there were no oil slicks, see Stonebraker Dep. 60:12-25; Basham Dep. 20:7-11, one witness testified to having seen an oil slick at the very spot where Irvine's tanker left the road, see Brockett Dep. 37-38; 158:14-20. We do not find the district court's determination on this point to be clearly erroneous.

Indeed, the record contains evidence supporting just this theory. John Hansen, a Staff Sergeant traveling ahead of Carmichael in the May 22 convoy, averred that his vehicle "jolted," causing his stomach to drop, at the same point in the S-curve where Irvine's tanker rolled over. [Hansen Decl. ¶ 9]. The driver of Hansen's vehicle then radioed the other vehicles to inform them of the potential hazard. [Id.] Notably, despite the warning, the military convoy commander did not reduce the convoy's speed or take any other precautions. [Id. ¶ 10]. Whatever evidence Carmichael would present in an effort to show Irvine's negligence, KBR would surely rely on Hansen's statements, among other things, to argue that the military convoy commander was negligent in setting too fast a pace along the particularly treacherous route for the convoy, and in specifically ignoring evidence to this effect.

It is also important to note that there is evidence in the record concerning whether Sergeant Carmichael was wearing a seat belt during the ride. [Irvine Dep. 86:13-87:1]. In fact, there is evidence suggesting that the military specifically instructed shooters such as Sergeant Carmichael not to wear their seat belts (since wearing the belts made it difficult for shooters to survey the terrain and take aim). [See, e.g., Hansen Decl. ¶ 11]. This evidence, too, undeniably calls military actions and decisions into question and, equally clearly, would be part of KBR's defense if the case were to go forward.

Thus, a careful review of the record in this case cannot and does not establish that Irvine alone was responsible for the accident. Indeed, based on the evidence before us, a reasonable jury could conclude

that Irvine's fault for the accident was negligible or nonexistent. Because the issue of liability remains contested, in litigating the suit KBR would inevitably (and not without a substantial evidential foundation) try to show that unsound military judgments and policies surrounding every aspect of the May 22 convoy were either supervening or concurrent causes of the accident. Litigation involving these issues is undeniably foreclosed by the political question doctrine.

4.

Carmichael's final argument with respect to the first Baker factor is that even if her suit implicates military judgments, and even if her suit would entail scrutinizing and adjudicating those judgments in a federal court, the particular judgments in question are not of the kind traditionally insulated from judicial review. We disagree. The decisions at issue here were precisely the kinds of calculations calling specifically for military judgment, intelligence-gathering, and experience: only the military was in a position to calibrate the need for moving JP-8 fuel from Camp Anaconda to Al Asad in a time of war; only the military could accurately assess the risks presented by the mission; only the military was in a position to meaningfully balance those risks in light of its broader strategies and objectives; and only the military possessed the competence to make the many critical tactical decisions concerning the safest and most efficacious way to conduct the convoy.

In arguing that her suit does not implicate judgments requiring any special military expertise, Carmichael says that the convoy was not engaged in

the use of military force and that the rollover did not take place on a "battlefield" or in a "combat zone." Thus, she notes that the convoy did not come under attack at any point prior to the accident. She also notes that the convoy encountered no hostile activity for the ninety minutes following the accident during which the convoy was halted and Sergeant Carmichael was given medical attention. We remain unpersuaded.

As an initial matter, the area through which the convoy was traveling at the time of the accident can only be fairly characterized as a "battlefield" or a "combat zone." The fact that the convoy encountered no hostile activity immediately prior to or after the accident is of little moment. As we have already recounted, the departure of Irvine's convoy was delayed because an IED had hindered the progress of a previous convoy over the very same route; and later in the mission, a KBR driver was injured when his vehicle triggered an IED. The record also demonstrates that in previous weeks, several convoys traveling the same route had been attacked by insurgents, and that the attacks had become so frequent that the military was forced to close ASR Phoenix during the previous month. [Brocket Dep. 109-112]. The presence during the convoy of multiple armed escorts such as Sergeant Carmichael himself, as well as the inclusion of several military gun trucks in the convoy, attests to the profound danger inherent in the undertaking. On this record, it is entirely appropriate to describe the rollover as having occurred on a "battlefield" or in a "combat zone."

The deeper problem with Carmichael's argument, however, is the implicit suggestion that a military decision is unreviewable only if it somehow pertains to

battlefield or combat activities. While decisions relating to the latter issues are paradigmatically insulated from judicial review, it is neither necessary nor sufficient for purposes of the political question doctrine that military decisions relate to such matters. Rather, the political question doctrine has been deemed applicable to military training policies, see, e.g., Gilligan, 413 U.S. at 5-6 (suit was barred by political question doctrine because it entailed judicial review of "training, weaponry and orders" of the Ohio National Guard); Aktepe, 105 F.3d at 1403 (political question doctrine precluded personal injury suit arising out of accidental missile firing during NATO training exercises because the "Constitution reserves to the legislative and executive branches responsibility for developing military training procedures that will ensure the combat effectiveness of our fighting forces"); conscription, Cooper v. United States, 403 F.2d 71, 74 (10th Cir. 1968) (issues regarding constitutionality of the Universal Military Training and Service Act presented a political question); and the location of military bases, Bancoult v. McNamara, 445 F.3d 427, 436 (D.C. Cir. 2006) (decision to establish a military base in particular area presented a political question). See also Custer County Action Ass'n v. Garvey, 256 F.3d 1024, 1031 (10th Cir. 2001) (political question doctrine precluded court from reviewing FAA's decision, made in consultation with the Department of Defense, that airspace was necessary for military training).

In short, there can be little doubt that the military decisions plainly drawn into issue today -- concerning how to safely deliver vital military supplies through hostile territory in war time -- are among the "complex, subtle, and professional decisions as to the

composition, training, equipping, and control of a military force" that are "essentially professional military judgments," Gilligan, 413 U.S. at 10, and that are properly insulated from judicial review. We conclude, therefore, that Carmichael's negligence claims satisfy the first Baker criterion and therefore implicate the political question doctrine. Accordingly, we affirm the district court's dismissal of Carmichael's negligence claims for lack of subject matter jurisdiction.

D. Judicially Discoverable and Manageable Standards for Resolving the Issues in the Case

In addition to determining that the political question doctrine applied when these facts are measured against the first Baker factor, the district court also concluded that this case implicated the second of the factors enumerated by the Supreme Court in Baker v. Carr: the lack of any judicially discoverable and manageable standards for resolving the dispute. Again, we agree.

We begin by recalling that the claims in Carmichael's complaint sound in negligence. In Georgia,[13] as elsewhere, a typical negligence claim requires the plaintiff to show:

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[13] The district court does not appear to have made any specific determination concerning the substantive law applicable to the dispute. We find it unnecessary to address the issue here as well since, given the uniformity of negligence law among the states, our analysis would remain the same regardless of which state's law applied. We assume here solely for purposes of discussion that Georgia law would apply.

> (1) A legal duty to conform to a standard of conduct raised by the law for the protection of others against unreasonable risks of harm; (2) a breach of this standard; (3) a legally attributable causal connection between the conduct and the resulting injury; and (4) some loss or damage flowing to the plaintiff's legally protected interest as a result of the alleged breach of the legal duty.

Adventure Outdoors, Inc. v. Bloomberg, 552 F.3d 1290, 1297 (11th Cir. 2008) (quoting Bradley Ctr., Inc. v. Wessner, 296 S.E.2d 693, 695 (Ga. 1982)). Furthermore, under Georgia law, it is "well settled that there may be more than one proximate cause of an injury in cases involving the concurrent negligence of several actors." MCG Health, Inc. v. Barton, 647 S.E.2d 81, 88 (Ga. Ct. App. (2007) (quotation omitted). Two or more "tortfeasors may be found to have committed 'concurrent' acts of negligence whether or not they acted in concert or their acts of negligence occurred at the same time." Delson v. Georgia Dep't of Transp., 671 S.E.2d 190, 194 (Ga. Ct. App. 2008).

Given the circumstances under which the accident in this case took place, we are without any manageable standards for making reasoned determinations regarding these fundamental elements of negligence claims. For example, given the extent to which the convoy was subject to military regulation and control, the question of whether Irvine acted reasonably or breached the standard of care cannot be answered by reference to the standards used in ordinary tort cases. As the district court correctly explained, in determining whether the standard of care has been breached in this case, "the question . . . would not be

what a reasonable driver would have done, or even what a reasonable driver in a 'less than hospitable environment' would have done." Carmichael II, 564 F. Supp. 2d at 1372. Rather, "the question before the Court would be what a reasonable driver subject to military control over his exact speed and path would have done." Id. We do not face the question of whether the defendants drove a fuel truck unsafely, say, on Interstate I-95 between Miami, Florida and Savannah, Georgia. Simply put, we have no readily available judicial standard with which to answer this question.

Similarly, the dangerousness of the circumstances under which Irvine was driving also renders problematic any attempt to answer basic questions about duty and breach. The difficulty here is much the same as that noted in Whitaker v. Kellogg Brown & Root, Inc., 444 F. Supp. 2d 1277 (M.D. Ga. 2006), another suit against KBR involving a military convoy in Iraq. In Whitaker, a soldier was killed after his truck was hit by a KBR truck that was traveling in a military convoy. The court concluded that the political question doctrine barred a suit brought on the soldier's behalf. Among other things, the court held that there were no judicially discoverable and manageable standards for resolving the questions presented by the case. The court explained:

> While Plaintiffs' simplistic labeling of this case as a "garden variety road wreck" is superficially appealing, it ignores the true nature of the circumstances giving rise to this tragedy. This wreck occurred in a combat zone during wartime while Plaintiffs' son, along with his Supply and Transport Troop and a group of civilian contractors, transported supplies from

> one military camp to another. The convoy operation was planned by the military, which determined the placement of vehicles in the convoy, the speed of the convoy, and the distance between vehicles in the convoy. Clearly, these circumstances differ dramatically from driving on an interstate highway or county road in the United States without any constraints other than ordinary skill, judgment, and prudence. The question here is not just what a reasonable driver would do -- it is what a reasonable driver in a combat zone, subject to military regulations and orders, would do.

Id. at 1282.

The same reasoning applies here. In the typical negligence action, judges and juries are able to draw upon common sense and everyday experience in deciding whether the driver of a vehicle has acted reasonably. But these familiar touchstones have no purchase here, where any decision to slow down could well have jeopardized the entire military mission and could have made Irvine and other vehicles in the convoy more vulnerable to an insurgent attack.

Nor is the problem merely the lack of standards for assessing the reasonableness of Irvine's conduct. As our previous discussion makes clear, it would be impossible to ascertain Irvine's potential liability in connection with the rollover without determining the military's liability. Thus, for example, it would be necessary to ask whether the convoy's rate of speed was reasonable given the poor condition of a serpentine road and the threat of insurgent attacks; whether the circumstances warranted the presence of

armed escorts; whether an escort should have been assigned to Irvine's vehicle, given the fact that he had never driven with one before; and whether the military had properly trained Sergeant Carmichael concerning the use of his seat belt. These questions, and others like them, are critical for assessing whether the military might have been negligent and whether its negligence might have played a causal role in the accident. But these matters defy resolution by means of conventional judicial standards used in ordinary tort cases. As we have held before, courts "lack standards with which to assess whether reasonable care was taken to achieve military objectives while minimizing injury and loss of life." Aktepe, 105 F.3d at 1404.

Carmichael contends, nevertheless, that no special standards are needed to resolve the dispute. Rather, she claims, the case can be adjudicated using the same rules and principles employed in ordinary negligence cases. Carmichael purports to cite several cases in support of her argument, but none of these is apposite. Carmichael relies most heavily on our recent decision in McMahon, in which we first discussed the application of the political question doctrine in the context of suits against a civilian contractor as opposed to a branch of the government, and in which we held that the plaintiffs' suit was not barred by the political question doctrine. If ordinary tort principles were deemed workable in those cases, Carmichael argues, they should be deemed workable here as well. Unfortunately, Carmichael's reading of McMahon is flawed.

In McMahon, three American soldiers were killed when the plane that was transporting them crashed into a mountain in Afghanistan. The soldiers' families

brought a wrongful death suit against Presidential Airways, the civilian corporation that the military had contracted with to provide air transportation and other services in connection with U.S. military efforts in Afghanistan. We held that the suit was not barred by the political question doctrine. Specifically, we held that the first Baker factor was not met because, based on the allegations in the plaintiffs' complaint, it was impossible to determine whether the suit would require reexamination of any decision falling within the military's discrete areas of responsibility. 502 F.3d at 1360. We also rejected the claim that the suit met the second Baker factor because it would require the application of unmanageable judicial standards. As we observed:

> We readily acknowledge that flying over Afghanistan during wartime is different from flying over Kansas on a sunny day. But this does not render the suit inherently non-justiciable. While the court may have to apply a standard of care to a flight conducted in a less than hospitable environment, that standard is not inherently unmanageable. The flexible standards of negligence law are well-equipped to handle varying fact situations. The case does not involve a sui generis situation such as military combat or training, where courts are incapable of developing judicially manageable standards.

Id. at 1362.

This case differs from McMahon in a number of critical respects. First, the relationship between the military and Presidential in McMahon differs

markedly from the relationship between the military and KBR here. In McMahon, the military's authority and responsibility over Presidential's activity was limited and discrete. Consequently, there was no necessary reason for thinking that adjudicating the suit would require the court to review military decisions. Here, by contrast, the military's control over fuel-supply convoys was "plenary," Carmichael II, 564 F. Supp. 2d at 1368, thus ensuring that virtually any question concerning the convoy's mission would inevitably implicate military judgments.

In addition, the accident at issue in McMahon took place during a more or less routine airplane flight. McMahon never claimed that the military activities in Afghanistan were related in any way to the accident, McMahon, 502 F.3d at 1337 n.3, and the fact that the crash took place over Afghanistan during wartime was incidental. In Carmichael's suit, however, the military dimension of the underlying events is utterly central: the convoy's mission was to deliver fuel supplies necessary for military operations; the conditions under which the convoys traveled were not merely "inhospitable"; they were potentially life-threatening.

Finally, our holding in McMahon was merely provisional, turning in key part on the limited nature of the factual record in the case. Given the lack of discovery in the case, we explained that it was simply too soon to tell whether the plaintiff's suit would implicate political questions. Id. at 1362. We expressly noted, however, that a different conclusion might be reached if the question were raised again after development of the record. Id. at 1362 n.31. By contrast, the record before us in this case has been fully developed, and based on our review of the record,

it is completely evident that the suit would require us to review many basic questions traditionally entrusted to the military, and that we have no judicially manageable standards for adjudicating the issues in the case.

For largely the same reasons, Carmichael's reliance on the Fifth Circuit's decision in Lane is also misplaced. In Lane, KBR was sued by employees who had been injured by insurgent attacks while driving trucks in military convoys in Iraq. According to the plaintiffs, KBR told them that they would be "100% safe," and would never be required to work in war zones or combat areas. Lane, 529 F.3d at 554. The plaintiffs claimed that the job was much more dangerous than KBR had led them to believe. Accordingly, they asserted fraud and fraud-based claims such as deceit, fraud in the inducement, intentional concealment of material facts, intentional misrepresentation, and civil conspiracy to commit fraud. Id. at 555. In addition, some of the plaintiffs asserted negligence claims against KBR as well. KBR claimed that the suits were nonjusticiable on political question grounds. The Fifth Circuit disagreed.

Despite its factual similarity to the present case, Lane is not instructive here. First, no discovery had been taken in the case. Hence, the court had a very limited factual record to rely upon in determining whether the suit would raise political questions. Thus, as in McMahon, the court's conclusion was preliminary, emphasizing that "the case needs further factual development before it can be known whether that doctrine is actually an impediment." Id. at 554. Moreover, theattack in Lane was essentially facial in nature, and the court accordingly viewed the

complaint's allegations in the light most favorable to the plaintiffs. Id. at 557. Furthermore, the claims at issue in Lane were very different from those asserted here. As noted above, the Lane plaintiffs asserted both fraud-based claims and negligence claims. Although it easily concluded that it was too early to decide whether the political question doctrine applied to the fraud-based claims, the court regarded the negligence claims -- notwithstanding the undeveloped factual record in the case -- as "mov[ing] precariously close to implicating the political question doctrine." Id. at 567. Thus, Lane observed, as we did in McMahon, that "further factual development very well may demonstrate that the claims are barred." Id. In short, neither McMahon nor Lane supports Carmichael's contention that the political question doctrine is inapplicable here.

Nor are any of the other cases cited by Carmichael helpful to her case. For example, Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria, 937 F.2d 44 (2d Cir. 1991), arose out of a hijacking and murder committed by the PLO aboard a cruise liner. The family of the victim brought suit against the owner and operator of the vessel, who in turn impleaded the PLO. The PLO moved to dismiss, citing, among other things, the political question doctrine. The Second Circuit held that "the common law of tort provides clear and well-settled rules on which the district court can easily rely," and that, consequently, "this case does not require the court to render a decision in the absence of 'judicially discoverable and manageable standards.'" Id. at 49. After considering the other Baker factors, the court held that the political question doctrine did not apply.

The facts in Klinghoffer plainly differ from those here. The hijacking at issue in that case took place on board a cruise liner, not, as here, in the procession of a military convoy, trucking jet fuel between military base camps, in a military theater, in a time of war. Thus, aside from the fact that the acts were committed by members of the PLO, the questions presented in Klinghoffer had no political significance. The Second Circuit noted that the "PLO is a political organization that engenders strong feelings of both support and opposition, and that any decision the district court enters will surely exacerbate the controversy surrounding the PLO's activities." Id. However, the court went on to observe that the doctrine "is one of 'political questions,' not one of 'political cases.'" Id. (quoting Baker, 369 U.S. at 217). Here, in contrast, the entire character of the events in question is affected by the military context in which they took place. Thus, even if common law tort principles could be applied to the claims alleged in Klinghoffer, there is no reason to think that they could be similarly applied here.

Finally, Carmichael's reliance on Koohi v. United States, 976 F.2d 1328 (9th Cir. 1992), is misplaced. There, the Ninth Circuit held that the political question doctrine did not bar a suit involving the downing of a civilian aircraft by a United States warship, despite the fact that the incident occurred during a military action. The court noted that a "key element" of its conclusion was the fact that the plaintiffs' suit sought only damages. The court explained that "[d]amage actions are particularly judicially manageable. By contrast, because the framing of injunctive relief may require the courts to engage in the type of operational decision-making beyond their competence and constitutionally

committed to other branches, such suits are far more likely to implicate political questions." Id. at 1332. Carmichael claims that since she seeks only money damages, her suit, too, will have no impact on military policies, procedures, or the conduct of war. But the critical point is not just whether the decision would affect military procedures. The question also is whether Carmichael's suit would require a court to issue a decision on matters for which it effectively lacks any rule of decision. As we have explained, this case would require the district court to do precisely that.

As with the first Baker factor, then, we agree with the district court's conclusion that the second Baker factor applies to Carmichael's suit. Since there are no readily ascertainable and judicially manageable standards to be used in determining or apportioning Irvine's, KBR's, and the military's respective degrees of liability, the district court correctly concluded that the political question doctrine applied and that the action must be dismissed for lack of subject-matter jurisdiction.

E. Negligent Hiring, Training, Supervision, and Entrustment

Besides seeking to hold KBR vicariously liable for Irvine's alleged negligence, Carmichael also seeks to hold KBR primarily liable for its own negligence. Specifically, Carmichael's complaint asserts claims for negligent supervision, negligent training, negligent retention, and negligent entrustment. For several reasons, these claims fail.

As an initial matter, we believe that, of these claims, only Carmichael's negligent training and negligent supervision claims have been preserved on appeal. Carmichael scarcely mentions the other claims, either in her briefing before the district court or on appeal. The "law is by now well settled in this Circuit that a legal claim or argument that has not been briefed before the court is deemed abandoned and its merits will not be addressed." Access Now, Inc. v. Southwest Airlines Co., 385 F.3d 1324, 1330 (11th Cir. 2004). Giving Carmichael the benefit of the doubt, her discussion of the negligent training and negligent supervision claims, while minimal, are nevertheless sufficient to put these claims, and only these claims, properly before us.

Further, Carmichael's negligent training and negligent supervision claims are precluded by the political question doctrine. We first consider Carmichael's negligent training claim. Like the claims against Irvine, Carmichael's negligent training claim implicates both the first and second Baker factors.

First, the negligent training claim would entail judicial scrutiny of sensitive judgments customarily entrusted to the military. It is well settled that questions concerning military training have traditionally been insulated from judicial review. As the Supreme Court has observed, "[t]he complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." Gilligan, 413 U.S. at 10. Indeed, the Court has stated, "[i]t would be difficult to think of a clearer example of the type of

governmental action that was intended by the Constitution to be left to the political branches directly responsible -- as the Judicial Branch is not -- to the electoral process." Id.

Carmichael argues that her negligent training claim would not require judicial questioning of military judgments because Irvine's training was carried out entirely by KBR. For at least two reasons, however, we do not agree. As an initial matter, we are not convinced that none of Irvine's training was provided directly by the military. There is record evidence indicating that KBR's drivers received instruction regarding some techniques directly from the military. [See Brocket Dep. 139:13-140:9; 187:21-24 (stating that KBR drivers were taught a technique referred to as the "5-25 scan" by the military, which involves initially scanning the first five meters out from one's line of sight, and then scanning further out to twenty-five meters)].

The second and more thoroughgoing problem is that, even if the military never directly provided any of Irvine's training, the district court unambiguously found that KBR employees were trained according to military standards. Carmichael II, 564 F. Supp. 2d at 1368-69. Thus, the KBR instructors who trained Irvine were themselves trained by military personnel. Moreover, the materials used in training KBR drivers were taken directly from the military's training manuals. Id. at 1371 n.7. [See, e.g., Shack Dep. 13-14 (stating that he provided KBR's managers and foremen with the same training material, such as that included in FM 21-305, used by the U.S. military); Brocket Dep. 116, 120 (stating that Army's training program was "adopted" by KBR and is still used by

KBR today)]. Indeed, DoD regulations, as well as KBR's contract with the military, required that KBR be trained in accordance with military standards.[14] Given that Irvine's training was so deeply bound up with military regulations, we do not agree that Carmichael's negligent training claim could be litigated without subjecting military judgments and policies to the kind of scrutiny prohibited by the political question doctrine.

Similarly, we conclude that Carmichael's negligent training claim also implicates the second Baker factor. In addition to the fact that questions concerning military preparation and training have traditionally been entrusted to the executive and legislative branches, it is also well settled that courts lack judicially manageable standards for passing on such questions. Thus, in observing that the "complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments," the Supreme Court noted that it was "difficult to conceive of an area of governmental activity in which the courts have less competence." Gilligan, 413 U.S. at 10. We have no readily available standards for assessing

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[14] See, e.g., DoDI 3020.41 at 6.2.7.9 (Oct. 5, 2005) ("Contracting activities, the Military Departments, and the DoD Components shall ensure any training requirements, including specific training requirements established by the geographic Combatant Commander, and training required according to [specific] DoD Directive[s]."); see also LOGCAP Contract at H-13, DE #94 Ex. 5 at 00002 ("The contractor shall comply, and shall ensure that all deployed employees, subcontractors, subcontractors employees, invitees and agents comply with pertinent Service and Department of Defense directives, policies, and procedures[.]").

whether the training Irvine received was adequate to prepare him for the work he was to perform.

Finally, as with Carmichael's claim for negligent training, we conclude that her claim for negligent supervision also implicates the first and second Baker factors and thus is foreclosed by the political question doctrine. The issues of training and supervision are so closely related that we need do little more than reiterate the considerations made earlier. Like the matter of training, the supervision of personnel who participate in military operations clearly falls within the ambit of "[t]he complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." Gilligan, 413 U.S. at 10. Carmichael contends that KBR alone was responsible for supervising the performance of employees such as Irvine. The pertinent regulations, however, do not support this claim.

The Army Field Manual states that "[t]o fully integrate contractor support into the theater operational support structure, proper military oversight of contractors is imperative." FM 3-100.21 at 1-23. Moreover, as we have noted, the military retained ultimate authority to require the dismissal of any employee whose performance it found unacceptable.[15] Similarly, the parties' contract states

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[15] See, e.g., Army Reg. 715-9 at 3-2(f) ("In the event instructions or orders of the Theater Commander are violated, the Theater Commander may limit access to facilities and/or revoke any

that the "Contractor shall promptly resolve, to the satisfaction of the contracting officer, all contractor employee performance and conduct problems identified by the cognizant contracting officer or his/her designated representative." [LOGCAP Contract at H-13, DE #94 Ex. 5 at 00003]. In fact, the contract includes several pages of criteria and sub-criteria, setting forth in elaborate detail the performance standards against which KBR's performance was to be evaluated. [Id. at 13-17]. Furthermore, as the district court found, "[t]he military convoy commander is also responsible for inspecting personnel and vehicles in preparation for the convoy." Carmichael II, 564 F. Supp. 2d at 1369 n.6. To be sure, KBR had responsibility for supervising employees such as Irvine. Nevertheless, that authority plainly was not exclusive or absolute. Thus, the inquiry necessary to adjudicate Carmichael's negligent supervision claim could not be cabined to KBR's supervisory practices, but would rather require examination of military policies and judgments.

The central problem remains that we are still required to reexamine crucial military decisions. While the specifics of Carmichael's negligent supervision claim are ill-defined and stated in only the briefest terms, to the extent that she claims that KBR's negligent supervision inhered in assigning Irvine to the May 22 convoy despite his purported exhaustion, this explains precisely why the claim is barred by the political question doctrine. This claim would

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special status a contractor employee has as an individual accompanying the force to include directing the Contracting Officer to demand that the contractor replace the individual.").

undeniably require Carmichael to show that Irvine's driving was the sole cause of the accident, that Irvine's poor driving was due to fatigue, and that Irvine's fatigue was the result of KBR's supervisory practices. For the many reasons that we have already indicated, however, none of these determinations could possibly be made without also reviewing many sensitive military judgments and policies. Thus, and perhaps most importantly, it would be impossible to determine that Irvine's driving alone was the sole cause of the accident or to possibly apportion blame without ruling out the potential causal role played by pivotal military judgments, including: (1) the initial decision to transfer the fuel by means of a land convoy; (2) the route the military convoy was required to travel; (3) the timing of the convoy; (4) the speed at which it was required by the military to travel; (5) the spacing between the vehicles; (6) the nature and size of the military support accompanying the convoy; and (7) Sergeant Carmichael's duties and responsibilities as a shooter. Moreover, it would be impossible to determine that Irvine's purported exhaustion was due entirely to KBR's negligent supervision or to assess the reasonableness of KBR's supervisory policies without at the same time necessarily assessing the military's supervisory policies as well. As we have explained, the military's supervisory policies were deeply intertwined with KBR's.

Nor, finally, can we discern any readily available standards by which to answer such questions regarding supervisory matters. In the context of an ordinary employer-employee relationship, courts are perfectly capable of fashioning and applying standards for determining the adequacy of an employer's supervisory practices. Given the military nature of the

work at issue in this case, however, ordinary criteria are no longer useful. Courts are simply not equipped to pass judgment on the degree of supervision appropriately exercised over personnel charged with performing the tasks Irvine was charged with performing, nor on the standards according to which his performance should be judged.

In short, we conclude that Carmichael's negligent training and supervision claims must be dismissed, since these, like her other claims, inevitably would raise political questions prohibited by the first and second Baker factors.

III. CONCLUSION

The accident in which Sergeant Carmichael was grievously injured can only be considered a tragedy. Nevertheless, we are without the power to inquire into who or what might have been responsible for the tragedy. To do so inevitably would require us to address matters that have been definitively entrusted to other branches of the government, and to adjudicate questions that defy resolution by any judicially manageable standards. That courts are forbidden from addressing such political questions is fundamental to the separation of powers on which our system of government is based, and we are constrained to adhere to that principle no matter how deeply we may sympathize with the plaintiff in the case. Accordingly, we affirm the district court's dismissal of Carmichael's suit for lack of subject-matter jurisdiction.

AFFIRMED.

KRAVITCH, Circuit Judge, concurring in part and dissenting in part:

The district court, in making its jurisdictional determination, found that the military "did in fact control every aspect of the organization, planning and execution of the convoy in question" including the training of the drivers, the route and speed of the convoy, and that the military even ordered each vehicle in the convoy to follow "a prescribed distance behind and exactly in the tire tracks of the vehicle in front of it." Based on these factual findings – which I agree are not clearly erroneous – I concur in the majority's conclusion that a court can not consider the individual negligence of the driver in this case without reexamining sensitive military decisions. Accordingly, I agree that the negligence claims against the driver and the claims against KBR which are dependent upon a finding of driver negligence are barred by the political question doctrine.

I respectfully dissent, however, because in my view Plaintiffs have sufficiently alleged a claim of negligent supervision based on their allegation that KBR breached the requisite duty of care by requiring its driver to work unreasonably long hours, causing driver fatigue, which was a proximate cause of the injury. In its otherwise thorough order, the district court made no factual finding as to whether the military was involved in setting the drivers' work schedules or was responsible for selecting specific drivers for its missions. The record is therefore insufficient, in my opinion, to determine whether consideration of the negligent supervision claim would require the reexamination of a military decision. For this reason,

I would remand the matter to the district court for further factual findings on this jurisdictional question.

As an initial matter, I disagree with the majority's conclusion that consideration of the negligent supervision claim "would undeniably require Carmichael to show that Irvine's driving was the sole cause of the accident." Supra, at Section II.E. It is true that where the sole proximate cause of the alleged injury is the negligence of the employee, to find the employer liable it must first be found that the employee was negligent as charged. Under Georgia law, however, if the negligence of the employer has caused the driver-employee to be fatigued and physically unfit to perform his job, and this fatigue is the proximate cause of the accident, the employer may be found negligent even without a corresponding finding that the driver was negligent. In Reliable Transfer Co. v. Gabriel, 65 S.E.2d 679 (Ga. Ct. App. 1951), the Georgia Court of Appeals upheld a verdict against an employer, who was liable for his negligence in permitting his co-defendant-driver to operate his truck continuously for longer hours than was permitted by a rule of the Interstate Commerce Commission ("ICC"), despite the fact that the jury found that the driver was not negligent. The court explained that the driver's actions were caused by his fatigue, which, in turn, was caused by the employer's negligence in causing and permitting him to work in excess of the time determined by the ICC as likely to cause fatigue. Accordingly, an employer behaves negligently if he requires his driver to work past the point where, due to fatigue, he is physically unable to operate his vehicle with due care and diligence. Then, if the driver's physical unfitness is found to be the cause of an accident, the employer's liability for

creating this dangerous situation is not dependant upon a finding that the driver himself was negligent. See also Dugas v. Pelican Construction Co., 481 F.2d 773, 776 (5th Cir. 1973)[1](holding that the inattention of the seamen was the result of fatigue, a condition which should have been foreseen by the master, considering the unrelieved long hours and sustained heavy labor; therefore, the master's negligence was the sole proximate cause of the accident and the seamen's dereliction, if any, did not constitute negligence on their part). In my view, therefore, the question of KBR's own liability for negligently allowing Irvine to become physically unfit to operate his vehicle could be submitted to a jury without necessarily implicating Irvine's conduct or any of the myriad of military decisions which permeated the moment of the accident.

In this case, the undisputed evidence shows that Irvine was on duty in excess of 75 hours in the 6 days preceding the day of the accident.[2] This evidence

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[1] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[2] The time cards for the week of the accident, which Irvine testified are accurate, establish that Irvine worked 12 hours on May 16th, 14 hours on May 17th, 12.5 hours on May 18th, 12 hours on May 19th, 13.5 hours on May 20th, and 12 hours on the day before the accident, May 21st. As such, Irvine admits to working 76 hours in the six days prior to the accident. On the day of the accident, Irvine also worked a full 12-hour day.

suggests that driver fatigue caused by over-work[3] may have been a proximate cause of the accident, which supports Plaintiffs' negligent supervision claim. The majority – reaching an issue that was not addressed by the district court – concluded that Plaintiffs' reliance on this evidence was "misplaced." Supra, at Section II.C.3. The majority explained that because Irvine testified that he spent only a portion of the hours indicated on his time cards driving and that most of his time was spent performing other menial tasks, "the figures shown on Irvine's time cards do not establish whether Irvine was exhausted at the time of the May 22 convoy, and do not explain what role, if any, that purported exhaustion might have played in the

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[3] KBR's internal investigation determined that the accident was caused by the driver's traveling at "excessive speed while negotiating a curve [and] not paying attention to surroundings." There have been numerous studies on the connection between fatigue and a driver's ability to be attentive. See, e.g., David Polin, Cause of Action Against Trucker or Truck Driver for Injuries Caused by Driver Fatigue, 17 Causes of Action 2d 105 (2006) (listing 20 such studies, scientific and otherwise, in the bibliography). The negative effect fatigue has on a driver's ability to keep a proper lookout is not a newly-discovered phenomenon. Indeed, as early as 1937, the ICC passed regulations limiting a commercial driver's hours of service to protect the public from the danger posed by fatigued drivers. Ex Parte No. MC-2, In the Matter of Maximum Hours of Service of Motor Carrier Employees, 3 M.C.C. 665 (I.C.C. Dec. 29, 1937) (noting that "[a] fatigued driver, whether that fatigue results from excessive hours of work or other causes, may become an inattentive, careless, or otherwise unsafe driver").

accident."[4] Id. I do not agree with the majority's

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[4] The majority also states that Irvine "clarified that the time cards reflected twelve hours of pay per day, not twelve hours of work. He explained that the twelve hours included 'probably a lot of bunker time at night.'" Supra, at Section II.C.3 (emphasis in original). I disagree with this characterization of Irvine's testimony.

In its entirety, the section of the deposition relied upon by the majority is as follows:

> Q: So from the week of 5/9 to 5/13, you worked a total of 99.5 hours?
>
> A: Well, that's deceptive when you look at that.
>
> Q: Tell me what you're talking about.
>
> A: We have 12 hours a day we're working. That was probably a lot of bunker time at night.
>
> Q: Am I correct that you put in for 99.5 hours of total work that week [of 5/9 to 5/13]?
>
> A: I put in for 99.5 for pay that week.
>
> Q: Okay.
>
> A: These hours over 12 are representing hours in the bunker from mortar attacks and rocket attacks that we were required to go to the bunker. It wasn't long after that they stopped requiring us to go to the bunker because it was costing too much money, and they just put on your PPE gear and stand by.

(Emphasis added). In this testimony, Irvine admits to being required to work 12-hour days, but explains that time on the time cards which exceeds 12 hours for a day is probably bunker time. Indeed, if taken at face value, the time cards at issue indicate that Irvine worked an average of 19.9 hours a day from May 9th to May 13th. As such, it is reasonable to assume that Irvine meant that the nearly 8 hours a day in excess of his 12 working hours represented paid "bunker" time. Irvine did not claim, as the majority suggests, that his regular 12-hour workday included "a lot of bunker time."

If, as he claims, Irvine limited himself to working 12 hours a

conclusion.

First, I do not believe this court should be considering the merits of Plaintiffs' claims at this point in the litigation.[5] We are constrained to consider only whether the district court's findings of jurisdictional facts are clearly erroneous and, based upon those facts, whether the consideration of any of the underlying claims is barred by the political question doctrine. In responding to Defendants' motion to dismiss, Plaintiffs were required to submit evidence establishing that the resolution of their negligent supervision claim would not require the reexamination of a military decision. They met this burden by submitting the deposition of Robert Stonebraker, a KBR employee and the convoy commander, who testified that although the military determined when and how it needed certain items moved, the KBR foremen were responsible for assigning specific drivers to the convoy. Nothing in the Defendants' motion to dismiss for lack of subject matter jurisdiction required Plaintiffs to submit evidence establishing causation or otherwise supporting the merits of their claims. Accordingly, the fact that the current record does not definitively show

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day, he still would have been on-duty at least 72 hours in the six days preceding the day of the accident.

[5] Furthermore, even if the jurisdictional inquiry does require consideration of the merits of the underlying claim, I believe the majority should have applied the "Rule 56 summary judgment standard" in making this inquiry. Lawrence v. Dunbar, 919 F.2d 1525 (11th Cir. 1990) (adopting the summary judgment standard in evaluating Rule 12(b)(1) motions asserting factual challenges to subject matter jurisdiction which also implicate the merits of a claim).

what role driver fatigue played in causing the accident is neither remarkable nor relevant to our jurisdictional inquiry.

Second, I disagree with the majority's conclusion that because Irvine was not driving for part of his working hours, the time card evidence is insufficient to support Plaintiffs' claim that fatigue was a cause of the accident. Under the regulations passed by the Federal Motor Carrier Safety Administration ("FMCSA") to ensure a safe environment for the commercial drivers and for the driving public -- and which KBR allegedly required its drivers to follow – a motor carrier is prohibited from permitting any driver "to drive a property-carrying commercial motor vehicle . . . for any period after . . . having been on duty 70 hours in any period of 8 consecutive days." FMCSR § 395.3(b) (emphasis added). This regulation specifies that, in addition to driving time, "on-duty time" means "all time from the time a driver begins to work or is required to be in readiness to work until the time the driver is relieved from work and all responsibility for performing work." FMCSR § 395.2 (emphasis added). Thus, in requiring Irvine to drive after being on-duty for more than 75 hours in the preceding 6 days, KBR acted in a manner which the FMCSA has proscribed for motor carriers in the United States. Indeed, a commercial driver in the United States would be considered unfit to drive under the FMCSA's regulations if he had been on-duty in excess of 70 hours in the preceding 8 consecutive days. I believe, therefore, that the evidence raises a genuine issue of material fact as to whether driver fatigue was a contributing cause of this accident. Because deciding this issue would go to the merits of Plaintiffs' claim, the district court was required "to find that jurisdiction

exists and deal with the objection as a direct attack on the merits of the plaintiff's case." Morrison v. Amway Corp., 323 F.3d 920, 925 (11th Cir. 2003). Accordingly, I believe Plaintiffs sufficiently alleged and supported a claim of negligent supervision and, if the district court finds that a military decision is not implicated by its consideration, Plaintiffs should be given a proper opportunity to argue the merits of this claim to a factfinder.

Plaintiffs alleged that KBR's negligence in its supervision of Irvine was a proximate cause of the accident, presented evidence establishing that Irvine worked in excess of 75 hours in the 6 days before the day of the accident, and submitted sworn testimony indicating that KBR was solely responsible for providing the drivers necessary to satisfy the military's transfer needs and setting the drivers' work schedules. If KBR – not the military – was responsible for requiring Irvine to work this schedule, a jury could consider whether working such a schedule made Irvine unfit to perform his duties and thereby was a proximate cause of the accident without "reexamining a military judgment." The district court, however, made no findings of fact regarding the military's involvement in KBR's setting of its drivers' schedules or in KBR's staffing of the convoys. From the facts currently before us, then, I can not say whether a jury would be required to reexamine a military decision in resolving Plaintiffs' claim that KBR's negligence in scheduling Irvine to work 12-hour days was a proximate cause of the accident. See McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1361 n.30 (11th Cir. 2007) (noting that a challenge to the way a contractor provided "'supervision necessary to perform' the missions [the military] ordered" did not necessarily

"require reexamination of any decision made *by* the U.S. military"). Accordingly, I cannot agree with the majority that, under the facts as found by the district court, Plaintiffs' negligent supervision claim necessarily is barred by the political question doctrine. For this reason, I would remand this matter to the district court with instructions to make further jurisdictional findings on this issue.

I would also instruct the district court that it should apply the Rule 56 standard of review to the extent it is asked to make factual findings which implicate the merits of Plaintiffs' negligence claim. See Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990) (applying the summary judgment standard to determine whether the defendant federal employee was acting within the scope of his employment at time of his alleged negligence, because this inquiry was both a jurisdictional requirement under the Federal Tort Claims Act and an element of the underlying negligence claim). Although a district court usually has substantial authority "to weigh the evidence and satisfy itself as to the existence of its power to hear the case," Garcia v. Copenhaver, Bell & Assocs., 104 F.3d 1256, 1261 (11th Cir. 1997), it only has this authority "[i]f the facts necessary to sustain jurisdiction do not implicate the merits of plaintiff's cause of action." Morrison, 323 F.3d at 925. "If a jurisdictional challenge does implicate the merits of the underlying claim then: [T]he proper course of action for the district court is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case." Id. (quoting Garcia, 104 F.3d at 1261) (ellipses omitted). With these instructions, I would remand this matter. Accordingly, I respectfully dissent on this narrow ground.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

CIVIL ACTION FILE NUMBER 1:06-cv-507-TCB

[Filed July 9, 2008]

ANNETTE CARMICHAEL, Individually and as Guardian for KEITH CARMICHAEL, an incapacitated adult,	)
Plaintiff,	)
v.	)
KELLOGG, BROWN & ROOT SERVICES, INC., HALLIBURTON ENERGY SERVICES, INC. and RICHARD IRVINE,	)
Defendants.	)

ORDER

Before the Court is Defendants' renewed motion to dismiss Plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) on the grounds that

Plaintiff's claims are nonjusticiable under the political question doctrine [94].

I. Background

On May 22, 2004, Sergeant Keith Carmichael, a soldier in the United States Army, was serving as a military escort for a convoy of trucks operated by Defendants Kellogg, Brown & Root Services, Inc. ("KBR") and Halliburton Energy Services, Inc. ("Halliburton"). Carmichael was a passenger in a tractor-trailer driven by Defendant Richard Irvine, a civilian who was an employee of both corporate Defendants.

While traveling from Logistics Support Area Anaconda to Al Asad, Iraq, Irvine lost control of the tractor-trailer and drove off the road, whereupon the tractor-trailer overturned in a ravine. Carmichael was partially ejected from the cab of the tractor. His head and chest were pinned between the tractor and the ground. Six to seven minutes passed before rescuers could dislodge his body. During this time he experienced a loss of oxygen to his brain. Tragically, he suffered massive injuries and is now in a permanent vegetative state.

On February 1, 2006, Carmichael's wife, Plaintiff Annette Carmichael, individually and as her husband's guardian, filed this action in the State Court of Fulton County, Georgia, against KBR, Halliburton and Irvine. She alleges that Irvine negligently operated the tractor-trailer at an excessive speed and failed to maintain control of the tractor-trailer, thereby causing the accident; she also alleges that Irvine failed to properly inspect Defendants' equipment and vehicle

before operating them. Plaintiff further claims that the corporate Defendants are vicariously liable for Irvine's allegedly negligent conduct under the doctrine of respondeat superior and that the corporate Defendants are directly liable for negligently hiring, training and supervising Irvine.

On March 3, 2006, Defendants removed the case to this Court. On March 10, 2006, Defendants moved to dismiss the complaint, arguing that, based on certain U.S. Army regulations regarding convoy operations, Plaintiffs claims were nonjusticiable under the political question doctrine.[1]

On September 19, 2006, this Court denied Defendants' motions, finding that Plaintiff's claims would be barred by the political question doctrine only if "military decision-making or policy would be a necessary inquiry, inseparable from the claims asserted." *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 450 F. Supp. 2d 1373, 1375 (N.D.Ga. 2006) (quoting *Lessin v. Kellogg Brown & Root*, No. H-05-01853, 2006 U.S. Dist. LEXIS 39403, at *7 (S.D. Tex. June 12, 2006)). The Court also found that because the discovery period had just begun, it was impossible to say with certainty whether this case would require such inquiries into military decision-making as to evoke a nonjusticiable political

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[1] In the original motion to dismiss, Defendants also contended that as military defense contractors they are immune from liability under the combatant activities exception to the Federal Tort Claims Act. Defendants have not raised this issue in their renewed motion to dismiss.

question.[2] The Court allowed that if additional facts germane to Defendants' political question argument appeared during the discovery period, Defendants could renew their motion to dismiss.

On December 21, 2007, after completion of discovery, Defendants renewed their motion to dismiss, again arguing that Plaintiff's claims are nonjusticiable under the political question doctrine [94]. After considering the motion, Plaintiff's response, and Defendants' reply, the Court granted Plaintiffs motion for oral argument on the motion to dismiss and ordered the parties to submit statements of material fact supported by specific reference to record evidence. The parties submitted their statements of material fact in May, and the hearing on the motion to dismiss took place on May 21, 2008.

Defendants argue that two significant events pertinent to the political question doctrine occurred subsequent to the Court's ruling on Defendants' original motion to dismiss that establish with certainty that this case will involve nonjusticiable political questions. First, Defendants argue that *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007), endorses *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277 (M.D. Ga. 2006), a tort case strikingly similar to this case that was dismissed for

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[2] The Court noted, for instance, that it was "conceivable that at the time of the accident Defendant Irvine was driving the truck within the speed limit set by the military yet in a manner that was negligent in some other respect. In that event, the political question doctrine would not necessarily bar Plaintiff's claims." *Carmichael*, 450 F. Supp. 2d at 1376.

lack of subject matter jurisdiction based on the political question doctrine. Second, Defendants assert, declarations from four army officers and deposition testimony of five KBR personnel confirm and clarify the military judgments embedded in this suit and the authority the army exercised over every aspect of the military supply convoy.

II. Legal Standards

A. Standard on Rule 12(b)(1) Motion to Dismiss

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) may be based on either a facial or factual challenge to the complaint. *McElmurray v. Consol. Gov't of Augusta-Richmond County*, 501 F.3d 1244, 1251 (11th Cir. 2007). In considering a facial challenge, which simply alleges that the plaintiff failed to sufficiently allege a basis for subject matter jurisdiction, a court must accept the allegations in the complaint as true. *Id.* (likening a plaintiff's safeguards to "those retained when a Rule 12(b)(6) motion to dismiss for failure to state a claim is raised") (citation and internal punctuation omitted). A factual attack, in contrast, challenges "the existence of subject matter jurisdiction in fact, irrespective of pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." *Id.* (citation and internal punctuation omitted).

Where, as here, the 12(b)(1) motion involves a factual attack on subject matter jurisdiction and the plaintiff has had an opportunity for discovery and for a hearing on the motion to dismiss, the district court has the power to dismiss based on "the complaint

supplemented by undisputed facts plus the court's resolution of disputed facts." *Id.* (citation and internal punctuation omitted).

B. Political Question Doctrine

The political question doctrine is a function of the separation of powers among the three branches of government, and it "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986).

In *Baker v. Carr*, 369 U.S. 186, 217 (1962), the Supreme Court set forth six elements indicative of a nonjusticiable political question:

1) a textually demonstrable constitutional commitment of the issue to a coordinate political department;

2) a lack of judicially discoverable and manageable standards for resolving it;

3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;

4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;

5) an unusual need for unquestioning adherence to a political decision already made; and

6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

These elements are "probably listed in descending order of both importance and certainty." *Vieth v. Jubelirer,* 541 U.S. 267, 278 (2004).

At least one of these elements must be evident for the political question doctrine to apply. *Baker,* 369 U.S. at 217. The Court must make "a 'discriminating inquiry into the precise facts and posture of a particular case' before [it] may withhold its own constitutional power to resolve cases and controversies." *Lane v. Halliburton,* 529 F.3d 548, 558 (5th Cir.2008) (quoting *Baker,* 369 U.S. at 216; *accord McMahon,* 502 F.3d at 1358.

III. Discussion

A. Textually Demonstrable Constitutional Commitment of the Issue to a Coordinate Political Department

Defendants renew their contention that the first *Baker* element is implicated because Plaintiff's complaint necessarily raises issues that are committed to the discretion of the political branches of government. *See* U.S. CONST. art. I, § 8 (granting to Congress the authority to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces); U.S. CONST. art. II, § 2 (granting to the

president authority over the conduct of foreign affairs and over the armed forces as commander-in-chief). Defendants argue that because every aspect of the planning and execution of convoy missions–including the route and speed of the convoys–is determined by the military and not by civilian drivers, military decisions would necessarily be questioned were this case allowed to go forward.

1. Military Contractors and the Political Question Doctrine

In its Order on Defendants' original motion to dismiss, the Court expressly declined to follow *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277 (M.D. Ga. 2006).[3] Defendants argue that in *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007), which was published after this Court's Order, the Eleventh Circuit endorsed *Whitaker*. Therefore, Defendants contend, this Court

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[3] Both this case and *Whitaker* involved non-combat accidents in which a driver for a civilian contractor injured a U.S. soldier serving as an armed escort during a KBR convoy in Iraq.

In *Whitaker*, the district court found–based on the same army regulations regarding convoy operations proffered in Defendants' original motion to dismiss–that because the convoy operation was planned by the military and the military determined the placement of vehicles in the convoy, the speed of the convoy, and the distance between vehicles in the convoy, inquiries regarding military decision-making would be inextricable from the plaintiffs' claims. In this Court's Order denying Defendants' original motion to dismiss, the Court expressly declined to follow *Whitaker*, finding that the army regulations regarding convoy operations were insufficient to establish whether any of the factors set forth in *Baker* apply to Plaintiff's claims.

should follow *Whitaker* and dismiss the instant case under the political question doctrine.

In *McMahon,* a civilian contractor's airplane crashed in Afghanistan, killing several soldiers whom the contractor had committed to transport. The soldiers' survivors brought a negligence suit against the civilian contractor. Unlike the district court in *Whitaker,* the Eleventh Circuit found that the *McMahon* case did not present a political question.

Although *McMahon* and *Whitaker* arrived at different conclusions, *McMahon* cited *Whitaker* several times. Defendants characterize those citations as favorable and argue that *McMahon* therefore endorses *Whitaker.* Thus, according to Defendants, when this Court is presented with evidence of military control over convoys that is identical[4] to the evidence produced in *Whitaker,* this Court should also find that Plaintiff's claims will require judicial inquiries into sensitive military decision-making and therefore must also dismiss this case. The Court disagrees.

The Court has carefully reviewed *McMahon* and finds that it simply differentiates its facts from

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[4] The evidence presented in *Whitaker* and in support of Defendants' original motion to dismiss in this case consisted solely of army regulations regarding convoy operations and the use of civilian contractors. *See* Logistics Civil Augmentation Program, U.S. Army Reg. 700-137 (Dec. 16, 1985) ("LOGCAP"); Army Motor Transport Units and Operations, Army Field Manual 55-30 (undated revision superseding Army Field Manual 55-30 (Mar. 14, 1980)); Contractors Accompanying the Force, U.S. Army Reg. 715-9 (Oct. 29, 1999).

Whitaker[5] while arriving at the same conclusion that this Court reached in *Carmichael:* If there is no showing that resolution of a survivor's negligence claims would require the Court's reexamination of any decision made by the U.S. military, the case presents no political question, and therefore the Court has jurisdiction over the case. *McMahon,* 502 F.3d at 1359-62; *Carmichael,* 450 F. Supp. 2d at 1375.

Thus, the Court concludes that it is not constrained by *Whitaker* but must instead apply the precedent set out in *McMahon.* To invoke the first *Baker* factor, Defendants must first demonstrate that "the claims against [them] will require reexamination of a decision by the military" and that "the military decision at

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[5] The Eleventh Circuit noted in *McMahon* that in *Whitaker* the district court found that the suit should be dismissed because it would involve reexamination of a decision by the military; the Eleventh Circuit did not express any opinion regarding *Whitaker*'s factual analysis, instead simply accepting its findings at face value. *See McMahon,* 502 F.3d at 1356 n. 22, 1358 n. 26, 1360 n.27, 1362. Nor was *Whitaker*'s factual basis examined on appeal.

In *McMahon,* by contrast, the Eleventh Circuit affirmed the district court's finding that even though the airplane crash took place during a military mission, the plaintiffs' allegations related not to decisions for which the military retained responsibility but instead pertained "principally to the operation of the flight, for which [the civilian contractor] retained residual responsibility under the terms of the [Statement of Work]." *Id.* at 1362. Therefore, because the *McMahon* defendants failed to show that the military retained control over the aspects of the contractor's mission that were relevant to the plaintiffs' claims–unlike in *Whitaker,* in which the district court accepted the defendants' showing that the military retained complete control of the convoy–the political question doctrine did not apply to deprive the district court of subject matter jurisdiction.

issue is . . . insulated from judicial review." *Id.* at 1359-60. The Court found in its Order denying Defendants' original motion to dismiss that the army regulations alone were not sufficient evidence to prove that Plaintiffs claims would require the Court to reexamine a military decision.

2. Impact of New Evidence

Defendants contend that in addition to the army regulations proffered along with their original motion to dismiss, the evidence they now provide with their renewed motion will "confirm and clarify the sensitive military judgments involved in this suit and the plenary authority the Army exercised over every aspect of the military supply convoy" and "underscore[ ] the military judgments embedded in this case." Defendants highlight testimony confirming that the army, in commanding a dangerous military mission in an active combat zone, exercised plenary control over the convoy's exact path and speed.

Plaintiff, relying on testimony of the same deponents and on certain KBR training materials, points to testimony indicating that the convoy was a non-combat operation and that each individual driver retained discretion to vary his speed or course within the convoy in order to operate his vehicle safely. Thus, Plaintiff argues, the accident was a result of "Irvine's simple negligence when he drove off the roadway and rolled Defendants' tanker truck" and Plaintiff's claims do not require reexamination of any decisions by the military.

The Court has carefully examined the arguments and all of the evidence presented by each party and

finds the proffer sufficient to allow it to conduct the "discriminating inquiry into the precise facts and posture of the particular case" necessary to determine whether the political question doctrine may preclude subject matter jurisdiction over the case. *Lane*, 529 F.3d at 558 (quoting *Baker*, 369 U.S. at 216, 82 S.Ct. 691); *accord McMahon*, 502 F.3d at 1358.

a. Reexamination of a Military Decision

The Court concludes that the army did in fact control every aspect of the organization, planning and execution of the convoy in question. The KBR drivers were trained according to military standards, the military convoy commander retained responsibility for inspecting both drivers and their equipment before commencing the convoy, and the route and speed of the convoy were set by the military and not by the civilian drivers. Therefore, the conduct of the military and its handling of supply convoys used to support military operations would necessarily be questioned were this case allowed to go forward.

The army regulations proffered with Defendants' original motion to dismiss established the military's planning and supervisory role in conducting the LOGCAP convoys.[6] Testimony from the contractors,

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[6] Army regulations authorize the use of civilian contractors to provide selected services in wartime to augment army forces and free the military units to perform other duties. *See* LOGCAP at 1-1. The military recognizes that use of civilian contractors increases risk and that their performance "cannot be accurately predicted," and thus the major army commands are charged with

"evaluat[ing] each logistical support function, defin[ing] the acceptable degree of risk, and balanc[ing] its military and contractor support mix accordingly." LOGCAP at 2-4. Although commanders evaluating use of contractors must both assess the risk to the overall mission and consider the safety of contractor personnel, LOGCAP contractors are used for providing transport assistance when the army determines that contractor support is "the most effective, expeditious, or cost effective" means. FM 55-30 at 1-11; LOGCAP at 3-1.

The object of the motor transport units is to provide "a seamless transportation system that supports the movement requirements of the joint force and the Army." FM 55-30 at 1-1. Though the employees of LOGCAP contractors generally are not under the direct supervision of the military, and contractors are never placed "in a position of command, supervision, administration, or control" over army personnel, the military and its contractors are expected to work closely together. LOGCAP at 3-2(d)(2-3); *accord* FM 55-30 at 1-1 (establishing that the army is expected to integrate LOG CAP and other contract support and to "fight as a total force–active and reserve components and civilians."). Contractor employees are "expected to adhere to all guidance and obey all instructions and general orders issued by the Theater Commander." Army Reg. 715-9 at 3-2(f) (providing that although the military does not directly supervise contract employees, if the employee of a contractor violates the theater commander's orders, the theater commander may direct the contracting officer to demand that the contractor replace the employee).

The army regulations and directives also provide for the control, organization and planning of convoy operations, from vehicle maintenance to force protection. *See* FM 55-30 at ch. 5, 6, 9. The military convoy commander is responsible for preparing and planning convoy operations, and the plans are made according to standard operating procedures ("SOPs") developed by the military that encompass such matters as the duties of the military convoy commander and other convoy control personnel, convoy organization, preparation of convoy vehicles, operations security measures, and the maintenance and recovery of disabled vehicles.

proffered with the renewed motion to dismiss, makes clear that the army controlled the conduct of Carmichael's convoy at the most granular level. To a person, all of those testifying confirmed that the military commander set the convoy's pace and had the sole authority to adjust it. In setting the pace, the military commander was to consider the quality of the road, the capabilities of the trucks in his convoy, his drivers' skills, and the risk of enemy threat, among other things. Each vehicle in the convoy was ordered to follow a prescribed distance behind and exactly in the tire tracks of the vehicle in front of it.

Although Plaintiff makes much of Irvine's testimony that the individual drivers retain ultimate responsibility for the safe conduct of their vehicles, the statements she relies upon do not hold up under close scrutiny. Of course the driver is responsible for keeping his truck on the road; of course the driver would be the person to apply his truck's brakes; of

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Id. at 5-5. Military personnel also plan the route, determine placement of the vehicles within the convoy, set the space between vehicles, set the pace of the convoy, and coordinate all matters pertaining to convoy security, including the use of convoy escorts. *Id.* at 5-4. Factors impacting planning include "[m]ission, enemy, troops, terrain, . . . time available to drive [,] . . . the state of training of drivers, types of loads, number of vehicles involved, traffic conditions, quality of road networks, [and] time." FM 55-30 at 5-1.

The military convoy commander is also responsible for inspecting personnel and vehicles in preparation for the convoy. *Id.* The regulations address preventative maintenance requirements and establish that the "commander of the moving unit is responsible for the mechanical condition of his vehicles." FM 55-30 at 5-6; ch. 9.

course the military does nothing to "lock in" the speed of each convoy vehicle; of course a driver involved in an accident whose company command concluded the accident happened because his vehicle was traveling too fast for conditions would tell the accident review board that if he had it to do over, he would slow down–the army employs human beings, not automatons, to drive its trucks. None of this means that the army was not responsible for setting the convoy speed.

No more credible is Plaintiff's representation that KBR drivers were subject to KBR's control and direction rather than the military's. Although KBR trained the drivers and communicated orders to them, the military trained KBR's instructors and gave KBR the orders the civilian convoy commander communicated to his drivers. The Court also finds no credibility in the KBR "commander handbook" that Plaintiff contends proves that KBR planned and controlled the convoys; the handbook was not authenticated, and witnesses referred to the handbook as inaccurate guidelines that in any case were subordinate to military direction.

Plaintiff's characterizations ignore the convoy driver's reality. The drivers were subject to military orders regarding the speed and path of the convoy, and exercise of any inherent discretion to slow down would necessarily involve disrupting the military's pace and the ordered following distance. By slowing down or changing course, the driver would be implicitly reexamining the military's decision to maintain the convoy speed and path set by the military convoy commander.

Likewise, in this negligence action, during which the Court would be required to determine the proximate cause of the accident, the military's decisions regarding driver training, inspection of the drivers and vehicles, and the speed and path of the convoy would be "inextricable from the case at bar" and thus would also necessarily come into question. *See Baker,* 369 U.S. at 217.

b. Type of Decision Insulated from Judicial Review

To invoke the first *Baker* factor in an action against a civilian contractor, it is not enough for the contractor to show that the claims against it will require reexamination of a military decision; the contractor must also show that the military decision at issue is of the type that is typically insulated from judicial review. *McMahon,* 502 F.3d at 1359-60.

In other cases, courts have declined to exercise jurisdiction over claims that would require examination of "core military decisions, including [military] communication, training, and drill procedures" or "[t]he strategy and tactics employed on the battlefield." *McMahon,* 502 F.3d at 1359 (referring to *Aktepe v. United States,* 105 F.3d 1400 (11th Cir. 1997), a case in which a U.S. ship accidentally fired a live missile at a Turkish ship during a training exercise, and *Tiffany v. United States,* 931 F.2d 271 (4th Cir. 1991), a case in which a military fighter sent to intercept a private plane that failed to file a proper flight plan instead collided with it). Like *Aktepe* and *Tiffany,* this case would also require the Court to examine core military decisions and battlefield tactics.

Despite Plaintiff's numerous attempts to characterize the conditions under which the convoy was conducted as non-hostile, the convoy was ordered to conduct a highly dangerous wartime military mission under imminent enemy threat. The convoy took place during a period in which insurgent activity was so threatening that the military began restricting convoys to no more than fifteen vehicles. The military required the vehicles in the convoy to be spaced far enough apart to avoid presenting a condensed enemy target, yet close enough together to not lose artillery cover. The convoy was on constant lookout for improvised explosive devices ("IEDs") and sniper fire.

The military knew the mission was not safe but conducted it because the military needed fuel in Al Asad. ASR Phoenix, the road on which the rollover took place, was known to be highly dangerous and poorly maintained, but was considered by the military to be the safest route by which to move supplies from Anaconda to Al Asad. ASR Phoenix was a paved one-lane road that often harbored IEDs and oil slicks that insurgents created in attempts to force drivers toward the IEDs. The road contained poorly engineered curves that were banked the wrong way.

KBR personnel testified that convoys were attacked almost daily. Although the convoy did not have direct contact with any IEDs prior to the rollover, it was delayed prior to the rollover while the military detonated an IED in front of the convoy that preceded it, and after the rollover, the remaining vehicles in Carmichael's convoy encountered small-arms fire and an IED that caused severe injuries to a KBR driver.

Despite the enemy threat and the dangerous terrain, the military determined that LOGCAP support was appropriate. It notified KBR that the military needed its support in transporting jet fuel to Al Asad. KBR, with the military's approval, assigned Irvine to drive an 80,000-pound tanker containing jet fuel in the convoy. The military briefed the KBR drivers on the route and ordered them to follow the lead military truck's speed and maintain the prescribed spacing in order to minimize exposure to insurgent threat. Each driver was also ordered to follow in the exact tire tracks of the vehicle ahead of him in order to avoid triggering IEDs. As added security, the military assigned army shooters to several trucks in the convoy.[7] The military commander in the lead military vehicle set the pace; he knew that the S-curve was precarious and chose not to slow the convoy speed to accommodate it.

"The strategy and tactics employed on the battlefield are clearly not subject to judicial review." *McMahon*, 502 F.3d at 1359 (quoting *Tiffany*, 931 F.2d at 277). The Court finds that the rollover occurred in the course of Irvine's employment with KBR, as the contractor worked with the army to carry out the strategy and tactics the army had established for its battlefield mission. Therefore, the military decisions that would be questioned in this case are of the type typically insulated from judicial review.

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[7] Carmichael was assigned to Irvine's truck. The military had trained Carmichael on his duties as a shooter and had provided defensive driving training to KBR personnel who in turn trained their drivers to the military's standards.

Consequently, the Court finds that Plaintiff's negligence claims invoke the first *Baker* factor and thus present a nonjusticiable political question.

B. Lack of Judicially Discoverable and Manageable Standards for Resolving the Issue

Defendants also argue once again that the second *Baker* factor applies to this case because no judicially manageable standards exist for the resolution of the issues. Defendants claim that if this case is not dismissed, the Court will be required to evaluate the conduct of both the military and Defendants without having any standards with which to do so. Plaintiff argues that the case does not involve any issues which would give rise to judicially unmanageable standards and may be resolved by application of established negligence standards.

The Court agrees with Defendants that there are no judicially discoverable and manageable standards for resolving Plaintiff's claims. Now that the facts have been more fully developed, it is clear that contrary to Plaintiff's assertions, Irvine's driving responsibilities for KBR in Iraq were *not* "the same as if he was in Pensacola," and unlike the plane crash in *McMahon,* the Carmichael convoy did involve activity over which the military retained responsibility. The rollover took place on a route notorious for lethal insurgent activity while Irvine helped to transport jet fuel from one military camp to another as part of the convoy Carmichael was assigned to help protect. The military planned the operation and determined the placement of the vehicles in the convoy, their speed, and the spacing between the vehicles.

Thus, the question before the Court would not be what a reasonable driver would have done, or even what a reasonable driver in a "less than hospitable environment" would have done. *See McMahon*, 502 F.3d at 1364 (noting that because flying over Afghanistan during wartime was different from flying over Kansas on a sunny day, the district court would "have to apply a standard of care to a flight conducted in a less than hospitable environment, [but] that standard is not inherently unmanageable."). Instead the question before the Court would be what a reasonable driver subject to military control over his exact speed and path would have done. Again, this would necessarily require questioning the military's decisions regarding the planning and conduct of the convoy, presenting political questions over which the Court may not exercise jurisdiction.

C. Third and Fourth *Baker* Factors

Finally, Defendants again claim that the third and fourth *Baker* factors apply because the standards of interaction between the military and civilian contractors in a combat zone require initial policy decisions clearly committed to the discretion of the political branches, and a judicial decision calling into question the conduct of the United States concerning its ongoing military efforts in Iraq would express a lack of respect due to the coordinate branches of government that oversee those war efforts.

Because the Court has already found that this case presents nonjusticiable political questions under the first and second *Baker* factors, the Court declines to reach these additional arguments.

III. Conclusion

For the foregoing reasons, the Court finds–reluctantly–that this action presents a nonjusticiable political question, and consequently, the Court lacks subject matter jurisdiction over the case. Therefore, Defendants' 12(b)(1) motion is hereby GRANTED [94]. The Clerk is DIRECTED to close the case.

IT IS SO ORDERED this 8th day of July 2008.

/s/Timothy C. Batten,
Timothy C. Batten, Sr.
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE NO.
1:06-cv-507-TCB

[Filed July 9, 2008]

ANNETTE CARMICHAEL,	)
	)
Plaintiff,	)
	)
v.	)
	)
KELLOGG, BROWN & ROOT SERVICES, INC., et al.	)
	)
Defendant.	)
	)

JUDGMENT

This action having come before the court, Honorable Timothy C. Batten, Sr., United States District Judge, for consideration of defendant's motion to dismiss, and the court having granted said motion, it is

Ordered and Adjudged that the action be, and the same hereby, is **dismissed**.

Dated at Atlanta, Georgia, this 9th day of July, 2008.

JAMES N. HATTEN
CLERK OF COURT

By: s/ Harry F. Martin
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
July 9, 2008
James N. Hatten
Clerk of Court

By: s/ Harry F. Martin
Deputy Clerk

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 08-14487-EE

[Filed September 11, 2009]

ANNETTE CARMICHAEL, Individually and as Guardian for Keith Carmichael, KEITH CARMICHAEL, an incapacitated adult,	)
Plaintiffs-Appellants,	)
versus	)
KELLOGG, BROWN & ROOT SERVICE, INC., HALLIBURTON ENERGY SERVICES INC., JOHN DOE, RICHARD IRVINE,	)
Defendants-Appellees.	)

On Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before: MARCUS, KRAVITCH and ANDERSON, circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

ORD-42
(2/05)

APPENDIX E

U.S. Const. Article III

* * *

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state,

the trial shall be at such place or places as the Congress may by law have directed.

* * *

(2)

No. 09-683

IN THE

Supreme Court of the United States

ANNETTE CARMICHAEL, Individually and as Guardian for KEITH CARMICHAEL, an incapacitated adult,
Petitioners,

v.

KELLOGG BROWN & ROOT SERVICES, INC., HALLIBURTON ENERGY SERVICES. INC., AND RICHARD IRVINE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the political question doctrine bars adjudication of Petitioner's personal injury suit, which would require reexamination of U.S. Army policies, judgments, and decisions relating to the planning and execution of a war-time military fuel supply convoy in Iraq during Operation Iraqi Freedom.

CORPORATE DISCLOSURE STATEMENT

Respondent Kellogg Brown & Root Services, Inc. is a wholly owned subsidiary of KBR, Inc.

Respondent Halliburton Energy Services, Inc. is a wholly owned subsidiary of Halliburton Company.

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U.S. Const. art. II, § 2 4

No. 09-683

IN THE

Supreme Court of the United States

ANNETTE CARMICHAEL, Individually and as Guardian for KEITH CARMICHAEL, an incapacitated adult,
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v.

KELLOGG BROWN & ROOT SERVICES, INC., HALLIBURTON ENERGY SERVICES, INC., AND RICHARD IRVINE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF IN OPPOSITION

OPINIONS BELOW

The Eleventh Circuit's opinion affirming dismissal of Petitioner's damages suit (Pet. App. 1a-56a) is published at 572 F.3d 1271. The district court's opinion granting Respondents' motion to dismiss (Pet. App. 57a-77a) is published at 564 F. Supp. 2d 1363. The district court's initial opinion, denying Respondents' motion to dismiss but allowing that motion to be renewed following completion of discovery (Resp. App. 1a-18a), is published at 450 F.

Supp. 2d 1373 and included in the appendix to this brief.

STATEMENT OF THE CASE

1. "The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Because a political question is an issue that is "entrusted to . . . the political branches" of the Federal Government, *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004), "[t]he nonjusticiability of a political question is primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962); *see also Powell v. McCormack*, 395 U.S. 486, 517 (1969) ("[A] 'political question' [is] a question which is not justiciable in federal court because of the separation of powers provided by the Constitution."). Under Article III, "no justiciable 'controversy' exists when parties seek adjudication of a political question." *Mass. v. EPA*, 549 U.S. 497, 516 (2007); *see also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974) ("[T]he concept of justiciability, which expresses the jurisdictional limitations imposed upon federal courts by the 'case or controversy' requirement of Art. III, embodies . . . the political question doctrine[ ] . . . ."); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 981 (9th Cir. 2007) (The political question doctrine "is at bottom a jurisdictional limitation imposed on the courts by the Constitution, and not by the judiciary itself.").

In *Baker v. Carr*, this Court "set forth six independent tests for the existence of a political question." *Vieth*, 541 U.S. at 277. Any one of these *Baker* political question formulations, which "are probably listed in descending order of both importance and certainty," is sufficient to establish the presence of a nonjusticiable political question. *Id.* at 278. They begin with (i) "a textually demonstrable constitutional commitment of the issue to a coordinate political department," and (ii) "a lack of judicially discoverable and manageable standards for resolving it." *Id.* at 277-78 (citing *Baker*, 369 U.S. at 217). Thus, "[i]n determining whether a question falls within (the political question) category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." *Baker*, 369 U.S. at 210 (internal quotation marks omitted).

"It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches"—or "an area of governmental activity in which the courts have less competence"—than "[t]he complex subtle, and professional decisions as to the composition, training, equipping and control of a military force." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *see Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) ("[T]he Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare . . . ."); *Aktepe v. United States*, 105 F.3d 1400, 1403 (11th Cir. 1997) ("The Constitution

emphatically confers authority over the military upon the executive and legislative branches of government."); *Tiffany v. United States*, 931 F.2d 271, 277 (11th Cir. 1991) ("Of the legion of governmental endeavors, perhaps the most clearly marked for judicial deference are provisions for national security and defense.").

In view of the Constitution's commitment of the War Powers to the political branches, *see* U.S. Const. art. I, § 8 and art. II, § 2, and the concomitant lack of judicial standards for examining military policies and decisions, "[t]he political question doctrine, grounded in the separation of powers . . . operates to insulate sensitive military judgments from judicial review." *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1357 (11th Cir. 2007). Indeed, the nonjusticiability of military policies, judgments, and decisions is "an arena in which the political question doctrine has served one of its most important and traditional functions—precluding judicial review of decisions made by the Executive during wartime." *Lane v. Halliburton*, 529 F.3d 548, 558 (5th Cir. 2008).

Application of the political question doctrine requires a "discriminating inquiry into the precise facts and posture of the particular case." *Baker*, 369 U.S. at 217. To conduct such a "case-by-case inquiry," *id.* at 211, a court "must analyze [a case] as it would be tried, to determine whether a political question will emerge." *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196, 1202 (5th Cir. 1978). This threshold justiciability analysis is not limited to what a plaintiff alleges, how she characterizes her claims or

would attempt to prove them, or her legal theories. The analysis also must address how the case likely would be *defended* at trial. *See Lane*, 529 F.3d at 565 ("We must look beyond the complaint, considering how the Plaintiffs might prove their claims *and* how [the Defendants] would defend.").

2. Petitioner Annette Carmichael's husband, a U.S. Army sergeant, was seriously injured while protecting a military fuel supply convoy in Iraq during Operation Iraqi Freedom. He was serving as a "shooter" in a convoy tanker truck that overturned while attempting to negotiate a dangerous "S" curve on a poorly maintained, insurgent-infested, military supply route known as ASR Phoenix. The record establishes that the U.S. Army planned and controlled virtually every aspect of the convoy, including its exact timing, route, configuration, and speed.

Respondent Richard Irvine, a civilian, was behind the wheel of the convoy truck that overturned. He was employed by Respondent Kellogg Brown & Root Services, Inc. ("KBRSI"), which provided jet fuel transportation and other mission-critical support services to the U.S. military under a Logistics Civil Augmentation Program ("LOGCAP") contract and implementing Task Orders.

3. Mrs. Carmichael filed this state-law damages suit against Respondents in Georgia state court on behalf of her husband and herself. Shortly after removing the action to the U.S. District Court for the Middle District of Georgia, Respondents moved to dismiss for lack of subject-matter

jurisdiction on the ground of the political question doctrine. Respondents' motion contended that adjudication of the suit would require the court to examine nonjusticiable political questions ranging from the wisdom of the U.S. military's policy of using civilian contractors to provide combat-related logistical support services in Iraq (such as driving tanker trucks in military fuel supply convoys), to the Army's policies, judgments, and decisions in connection with the planning and execution of the particular military convoy involved in this suit.

a. The district court denied Respondents' initial motion to dismiss. Resp. App. 1a, 18a. The court explained that "[t]he discovery period has just begun, and because of the limited facts, it is impossible to say with certainty whether this case will involve a nonjusticiable political question." *Id.* 7a. The court further indicated that "[i]f additional facts appear during the discovery period that are germane to Defendants' political question argument, Defendants may renew their motions to dismiss on this ground." *Ibid.*

b. During the course of discovery, Respondents obtained extensive jurisdictional evidence relevant to the applicability of the political question doctrine to the circumstances of this case. This evidence not only included the deposition testimony of six KBRSI employees with first-hand knowledge of the convoy rollover incident in which Sgt. Carmichael was injured,[1] but also four

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[1] These KBRSI personnel are Respondent Irvine, who drove the truck involved in the rollover incident (Record

(footnote continued on next page)

declarations provided by the U.S. Army.[2] The court of appeals subsequently confirmed that the "testimony of both Army and KBR personnel . . . leaves no doubt [about] the military's complete control over military convoys." Pet. App. 21a.

c. Following completion of discovery, Respondents filed, under Fed. R. Civ. P. 12(b)(1), a renewed motion to dismiss on political question grounds. After reviewing the jurisdictional evidence

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on Appeal ("R") 4-94, Ex. 13); Holmes O. Brockett, who drove a KBRSI recovery vehicle in the convoy (R4-94, Ex. 11); Robert E. Stonebraker, who was the senior KBRSI member in the convoy (R4-94, Ex. 12); Kenneth A. Gardner, who was the KBRSI transportation foreman responsible for the KBRSI personnel on the convoy (R4-94, Ex. 14); Frazier Shack, who was the KBRSI senior transportation manager in Iraq responsible for the convoy (R4-94, Ex. 15); and Arthur E. Lange, who was KBRSI's Project Manager for KBRSI's Theater Transportation Mission in Iraq (R4-94, Ex. 16).

[2] These military declarants are (i) Major Gerald Tucker, the commander of Sgt. Carmichael's Army company (R4-94, Ex. 1); (ii) retired Major Robert W. Culver, former Army Administrative Contracting Officer responsible for the relevant KBRSI LOGCAP contract (R4-94, Ex. 2); (iii) Lt. Colonel Betty L. Holm, former Army manager responsible for planning, deploying, and tracking the military fuel supply convoy at issue (R4-94, Ex. 3); and (iv) former Staff Sgt. John C. Hansen, who was Team Leader of Sgt. Carmichael's squad in the convoy mission at issue and riding in a contractor-driven vehicle several trucks ahead of the convoy truck that Sgt. Carmichael was protecting (R4-94, Ex. 17).

submitted by Respondents, the district court found that "the army controlled the conduct of Carmichael's convoy at the most granular level." *Id.* 70a. Explaining that "Plaintiff's characterizations" regarding KBRSI's supposed control of the convoy "ignore the convoy driver's reality," *id.* 71a, the court granted respondents' motion to dismiss, holding that "this case would . . . require the Court to examine core military decisions and battlefield tactics." *Id.* 72a.[3]

4. On appeal, the Eleventh Circuit affirmed. The court of appeals agreed with the district court's determination that "adjudicating the dispute would require reexamination of the type of sensitive military judgments and decisions typically insulated from judicial review and that it was without judicially manageable standards for doing so." *Id.* 14a.

More specifically, "[a]fter thorough review [the court of appeals] conclude[d] that adjudicating the plaintiff's claims would require extensive reexamination and second-guessing of many sensitive judgments surrounding the conduct of a military convoy in war time -- including its timing, size, configurations, speed, and force protection." *Id.*

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[3] Because Respondents' Rule 12(b)(1) political question defense was a "factual attack" on the court's subject-matter jurisdiction, the district court was free to consider jurisdictional evidence (such as the Army declarations and KBRSI deposition testimony), and to weigh the facts rather than viewing them in the light most favorable to Petitioner. *See* Pet. App. 11a-12a; 61a-62a.

2a. In addition, the court of appeals held that it "can discern no judicially manageable standards for resolving the plaintiff's claims." *Ibid.* The court held, therefore, "that the political question doctrine bars the plaintiff's suit," and "affirm[ed] the district court's dismissal for lack of subject-matter jurisdiction." *Ibid.*

a. Citing its previous political question decisions in *McMahon* (a wrongful death suit filed on behalf of U.S. soldiers killed when a military contractor-operated aircraft crashed in Afghanistan) and *Aktepe* (a wrongful death suit involving Turkish sailors killed by missiles launched from an American aircraft carrier during a naval exercise), the court of appeals reaffirmed that "[t]here can be little doubt that military judgments generally fall into" the first *Baker* category of political questions—"issues entrusted by the Constitution's text to a coordinate political department." *Id.* 14a, 15a. The court cautioned that not "all cases involving the military are automatically foreclosed by the political question doctrine," but agreed with the district court "that Carmichael's suit would require reexamination of many sensitive judgments and decisions entrusted to the military in a time of war." *Id.* 15a, 16a.

Based on the expansive body of jurisdictional evidence developed during discovery in this case, the court of appeals concluded that "military judgments governed the planning and execution of virtually every aspect of the convoy in which Sergeant Carmichael was injured." *Id.* 16a. More specifically,

> the military decided the particular date and time for the convoy's departure; the

> speed at which the convoy was to travel; the decision to travel along a particular route (ASR Phoenix); how much fuel was to be transported; the number of trucks necessary for the task; the speed at which the vehicles would travel; the distance to be maintained between vehicles; and the security measures that were to be taken. Each of these critical determinations was made *exclusively by the military*.

Ibid. (emphasis added).

The court further observed that "each of these decisions required the specific exercise of military expertise and judgment." *Id.* 17a. "ASR Phoenix was a particularly treacherous roadway" because of its "serpentine path" and pothole-ridden physical condition due to "damage from IEDs and other munitions," and "most of all [because it] was a favored target of insurgent activity." *Id.* 7a, 17a. "In the face of these difficult military conditions, traveling on ASR Phoenix called for delicately-calibrated decisions based on military judgment, experience, and intelligence-gathering." *Id.* 17a. As a result, "the military made numerous notable tactical determinations concerning how the mission could most safely be executed." *Id.* 18a. For example, "[a] balance had to be struck so that the vehicles would be traveling swiftly enough to frustrate potential insurgent attacks, but not so fast that drivers would be unable to control their vehicles on the narrow, wandering, poorly-maintained road." Further, "it was necessary for the vehicles to maintain enough distance between one another to avoid becoming a condensed target for insurgent

attacks, but not so far apart as to lose artillery cover." *Ibid.* The court found that "[t]here is not the slightest hint in the record suggesting that KBR played even the most minor role in making any of these essential decisions." *Ibid.*

For these reasons, the court of appeals concluded that the first *Baker* political question formulation applies to, and forecloses, Petitioner's negligence claims relating to the manner in which Respondent Irvine operated the convoy vehicle that overturned.

> Because the circumstances under which the accident took place were *so thoroughly pervaded by military judgments and decisions*, it would be impossible to make any determination regarding Irvine's or KBR's negligence without bringing those essential military judgments and decisions under searching judicial scrutiny. Yet it is *precisely this kind of scrutiny* that the political question doctrine forbids.

Ibid. (emphasis added).

b. In concluding that the first *Baker* formulation applies, the court of appeals rejected each of Petitioner's arguments to the contrary.

(i) Petitioner asserted that Respondents, rather than the military, exercised control over the convoy. The court explained, however, that "the notion that KBR exercised any significant control over military convoys -- let alone 'main' control -- is completely implausible in light of the mountain of evidence to the contrary." *Id.* 20a; *see also id.* 21a (quoting U.S. Army declaration that "[t]he military convoy commander was in total command and

control of the convoy, including setting the speed at which the convoy traveled."). The court further indicated that "[t]he fact that Irvine had physical control over his tanker does not change the fact that he was operating at all times under orders and determinations made by the military. . . . [A]ny defense mounted by KBR or Irvine would undoubtedly cite the military's orders as the reason why Irvine did not reduce his speed." *Id.* 23a.

(ii) Petitioner contended that adjudicating her claims would not require the district court to "review" military judgments since, according to Petitioner, "Irvine's negligence alone caused the accident." *Ibid.* Based on its "careful review of the record in this case," however, the court of appeals rejected this argument, explaining that Petitioner "has not come close to showing that Irvine alone was responsible for the accident." *Id.* 24a, 26a. Instead, "in litigating the suit KBR would inevitably (and not without substantial evidential foundation) try to show that unsound military judgments and policies surrounding every aspect of the . . . convoy were either supervening or concurrent causes of the accident." *Id.* 27a. The court concluded that "[l]itigation involving these issues is undeniably foreclosed by the political question doctrine." *Ibid.*

(iii) The court disagreed with Petitioner's contention that the particular military judgments implicated by this case are not the kind traditionally insulated from judicial review. The court explained that "there can be little doubt that the military decisions plainly drawn into issue today -- concerning how to safely deliver vital military supplies through hostile territory in war time -- are

. . . 'essentially professional military judgments,' Gilligan, 413 U.S. at 10, and . . . properly insulated from judicial review." *Id.* 29a-30a.

c. The court of appeals further held that the second *Baker* formulation applies to this negligence suit because "given the extent to which the convoy was subject to military regulation and control," the court is "without any manageable standards for making reasoned determinations regarding [the] fundamental elements of negligence." *Id.* 31a. In so holding, the court rejected Petitioner's contention that "no special standards are needed to resolve the dispute." *Id.* 34a. The court explained that "[g]iven the circumstances under which the accident in this case took place . . . the question of whether [convoy truck driver] Irvine acted reasonably or breached the standard of care *cannot be answered by reference to the standards used in ordinary tort cases.*" *Id.* 31a (emphasis added). "[I]t would be impossible to ascertain Irvine's potential liability in connection with the rollover without determining the military's liability." *Id.* 33a.

d. In addition, the court of appeals held that Petitioner's claims for negligent training and supervision "must be dismissed, since these, like her other claims, inevitably would raise political questions prohibited by the first and second Baker factors." *Id.* 47a.[4] As to KBRSI's alleged negligent

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[4] The court found that Petitioner's claims for negligent hiring, retention, and entrustment were not preserved on appeal, but gave her "the benefit of the doubt" as to preservation of her "scarcely mention[ed] . . . negligent

(footnote continued on next page)

training of Respondent Irvine, the court concluded that the "claim would entail judicial scrutiny of sensitive judgments customarily entrusted to the military," and that it "could [not] be litigated without subjecting military judgments and policies to the kind of scrutiny prohibited by the political question doctrine." *Id.* 41a, 43a; *see also id.* 42a (noting (i) "record evidence indicating that KBR's drivers received instruction regarding some techniques directly from the military," and (ii) the district court's finding "that KBR employees were trained according to military standards"). The court of appeals also observed that "questions concerning military preparation and training have traditionally been entrusted to the executive and legislative branches [and] it is well settled that courts lack judicially manageable standard for passing on such questions." *Id.* 43a.

Along the same lines, the court concluded that "the inquiry necessary to adjudicate Carmichael's negligent supervision claim could not be cabined to KBR's supervisory practices, but would rather require examination of military policies and judgments." *Id.* 45a. The court explained that "the military's supervisory policies were deeply intertwined with KBR's." *Id.* 46a; *see also id.* 44a-45a (discussing jurisdictional evidence relating to Army supervision of LOGCAP contractor personnel). In particular, Petitioner's negligent supervision claim "would undeniably require Carmichael to show

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training and negligent supervision claims." Pet. App. 41a

that Irvine's driving was the sole cause of the accident, that Irvine's poor driving was due to fatigue, and that Irvine's fatigue was the result of KBR's supervisory practices." *Id.* 45a-46a. "[N]one of these determinations could possibly be made without also reviewing many sensitive military judgments and policies," and the court cannot "discern any readily available standards by which to answer such questions regarding supervisory matters." *Id.* 46a. [5]

5. The court of appeals denied Petitioner's requests for rehearing and rehearing en banc. *See id.* 80a-81a. She filed a timely petition for a writ of certiorari exactly 90 days later.

ARGUMENT

There is no reason for this Court to review the Eleventh Circuit's thorough, probing, and meticulously supported political question analysis. The court's holding that both the first and second *Baker* political question formulations apply to the circumstances of this case—a conclusion which is based on the court's careful review of the extensive jurisdictional evidence developed during pretrial

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[5] Judge Kravitch filed a separate opinion, concurring in part and dissenting in part. *See* Pet. App. 48a. She concurred "in the majority's conclusion that a court can not consider the individual negligence of the driver in this case without reexamining sensitive military decisions." *Ibid.* In her view, however, the Petitioner's negligent supervision claim should have been remanded "to the district court with instructions to make further jurisdictional findings on this issue." *Id.* 56a.

discovery—represents exactly the type of "discriminating inquiry into the precise facts and posture of the particular case" that *Baker* requires. *See* 369 U.S. at 217.

The Eleventh Circuit's decision is entirely consistent with this Court's political question jurisprudence and lower court precedents. It discusses at length, and in considerable detail, the specific reasons why adjudication of Petitioner's claims—*including Respondents' defense on the merits*—would be "inextricable" from *Baker*'s first and second political question formulations. *Id.* at 217.

As the court of appeals correctly concluded, the fundamental reason that adjudicating this suit would implicate nonjusticiable political questions is that the "*overwhelming evidence*" establishes that "*military judgments governed the planning and execution of virtually every aspect of the convoy* in which Sergeant Carmichael was injured." Pet. App. 16a, 19a (emphasis added). In other words, the jurisdictional evidence demonstrates that Respondents' every action relating to the military convoy incident in which Sgt. Carmichael was injured while serving in harm's way occurred entirely within—and cannot be isolated from—the U.S. military envelope. Petitioner fails to confront or acknowledge this fundamental jurisdictional fact, and instead, repeatedly begs the question of justiciability by arguing the alleged *merits* of her claims. *See generally Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-94 (1998) (assailing an "attempt to convert the merits issue in this case into a jurisdictional one . . . because it carries the courts

beyond the bounds of authorized juridical action and thus offends fundamental principles of separation of powers").

Furthermore, there is no split of authority regarding the political question doctrine's applicability to personal injury suits against private contractors that provide logistical services to support U.S. military combat operations overseas. The only two circuits that have considered the subject agree that the political question doctrine renders an action nonjusticiable where, as here, there is a robust body of jurisdictional evidence demonstrating that prosecution and/or defense of a particular action would become unavoidably entangled in a labyrinth of U.S. military policies, judgments, and decisions.

I. THERE IS NO CONFLICT BETWEEN THE TWO CIRCUITS THAT HAVE ADDRESSED THE POLITICAL QUESTION DOCTRINE'S APPLICABILITY TO DAMAGES SUITS AGAINST MILITARY SUPPORT CONTRACTORS

Petitioner does not, and cannot, point to any doctrinal conflict regarding the applicability of the political question doctrine to combat-zone military support contractors.

Only two previous circuit decisions—*McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007), and *Lane v. Halliburton*, 529 F.3d 548 (5th Cir. 2008)—directly address the subject. The certiorari petition filed in this case completely ignores both of those precedents. *McMahon* and *Lane*, and the opinion below, are in accord that the

political question doctrine bars damages actions against military support contractors where adjudication of a plaintiff's claims would require a court to reexamine military policies, judgments, or decisions. And all three cases are in agreement that a fully developed pretrial factual record, such as the extensive record of jurisdictional evidence here, sometimes is needed to support a determination that the political question doctrine applies to a particular damages suit against a military support contractor. Indeed, the political question issue is still percolating in both *McMahon* and *Lane*, where renewed motions to dismiss on political question grounds have been filed in district court following completion of pretrial discovery.

The Eleventh Circuit's opinion in this case is the first federal appellate decision to apply this Court's political question jurisprudence, including *Baker v. Carr* and *Gilligan v. Morgan*, as well as the political question principles adapted by the courts of appeals in *McMahon* and *Lane*, to a fully developed pretrial evidentiary record in a damages suit against a combat-zone military support contractor. Petitioner is mistaken, however, that "no court before has dismissed a case against a private entity on political question grounds." Pet. 9. During the past twenty years, a number of district courts have relied on the political question doctrine in dismissing wrongful death or personal injury claims against military

contractors in cases involving overseas, combat-related scenarios.[6]

Although the outcome of the Eleventh Circuit's definitive and unequivocal case-specific inquiry here differs from the *provisional* political question analyses in *McMahon* and *Lane*, which the courts of appeals in those two cases emphasized were based on limited evidentiary records, all three opinions are in harmony.

In *McMahon*, defendant Presidential Airways had "a contract with the Department of Defense . . .

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[6] *See, e.g., Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277 (M.D. Ga. 2006) (damages suit involving U.S. soldier killed in vehicular accident while providing armed escort to contractor-driven military supply convoy in Iraq); *Smith v. Halliburton Co.*, No. Civ. A. H-06-0462, 2006 WL 2521326 (S.D. Tex. Aug. 30, 2006) (damages suit involving contractor employee killed by suicide bomber who attacked contractor-operated military dining facility in Iraq); *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486 (C.D. Cal. 1993) (damages suit involving military personnel killed in "friendly fire" accident during Operation Desert Storm in Iraq); *Zuckerbraun v. Gen. Dynamics Corp.*, 755 F. Supp. 1134 (D. Conn. 1990), *aff'd*, 935 F.2d 544 (2d Cir. 1991) (affirmed on other grounds without reaching political question issue) (damages suit involving U.S. Navy sailors killed by Iraqi attack on U.S.S. Stark); *Nejad v. United States*, 724 F. Supp. 753 (C.D. Cal. 1989) (damages suit involving Iranian civilians killed in shoot down of airplane by U.S.S. Vincennes in Persian Gulf); *cf. Corrie*, 503 F.3d 974 (damages suit implicating the political branches' decision to grant military aid to Israel).

to provide air transportation and other support services in aid of the military mission in Afghanistan." 502 F.3d at 1336. Three U.S. soldiers died when the Presidential aircraft that was transporting them crashed into a mountain. After the soldiers' survivors filed a negligence suit, Presidential moved to dismiss on several grounds, including the political question doctrine. Based on a scant, pre-discovery evidentiary record, the district court denied the motion to dismiss, in part because "it did not yet appear that [plaintiff's] tort claims against a private contractor would require the court to examine the judgments or strategy of the United States." *Id.* at 1337.

The Eleventh Circuit affirmed, but recognized that

> [w]here sensitive military judgments are involved, courts lack the capacity to determine the proper tradeoff between military effectiveness and the risk of harm to the soldiers. . . .
>
> When a private contractor agent is entrusted with making or executing such sensitive military judgments, courts would be similarly powerless to determine whether the agent appropriately balanced military effectiveness and the safety of the soldiers.

Id. at 1350. The court of appeals further stated that

> [e]ven if courts were competent to develop liability standards in the area of sensitive military judgments, it would breach

> separation of powers to apply those standards to the military.
>
> It would similarly violate separation of powers for the courts to interfere with sensitive military judgments made or executed by private contractor agents of the military.

Ibid.

The court of appeals held in *McMahon* that Presidential had "not satisfied the threshold requirement for invocation of the first *Baker* factor, at least on the limited record now before us that the instant case will require reexamination of any decision made *by the military*." *Id.* at 1360. Further, the court held "it is not evident on the limited record" that "the case will require the application of judicially unmanageable standards." *Id.* at 1363; *see also id.* at 1365 n.36 (emphasizing the limited record before the district court).

To underscore the preliminary nature of its political question ruling based on the limited, interlocutory record on review in *McMahon*, the court stated as follows:

> We expressly do not (and could not) hold that this litigation will not at some point present a political question. . . .
>
> But at this juncture, when *almost no discovery has been completed*, we cannot say that resolution of this case will require the court to decide a political question.

Id. at 1365 (emphasis added).

In *Lane*, decided subsequent to *McMahon*, the Fifth Circuit consolidated appeals of three damages suits filed against KBRSI and other entities by or on behalf of former employees who were killed or injured in Iraq when the military supply convoy trucks that they were driving were attacked by insurgents. The district court dismissed each action on political question grounds. *See* 529 F.3d at 555-56. The court of appeals reversed and remanded, agreeing with the plaintiffs only "to the extent of concluding that the case *needs further factual development* before it can be known whether [the political question] doctrine is actually an impediment." *Id.* at 554 (emphasis added). The court acknowledged "the command" that "matters implicating foreign relations and military matters are generally beyond the authority or competency of a court's adjudicative powers." *Id.* at 559. And it explained that

> Plaintiffs' negligence allegations move precariously close to implicating the political question doctrine, and *further factual development* very well may demonstrate that the claims are barred.
>
> . . . .
>
> It is conceivable that further development of the facts on remand will again send this case toward the political question barrier. Permitting this matter to proceed now does not preclude the possibility that the district court will again need to decide whether a political question inextricably arises in this suit.

Id. at 567-68 (emphasis added).

In its opinion here, the court of appeals drew a sharp factual and postural—but *not* doctrinal—contrast with its own opinion in *McMahon*, and with the Fifth Circuit's ruling in *Lane*. For example, the court indicated, based on *McMahon*'s limited factual record, that "the accident . . . took place during a more or less routine airplane flight." Pet. App. 36a. But here, with the benefit of a comprehensive pretrial factual record, the court concluded that "the military dimension of the underlying events is utterly central." *Ibid.* Furthermore, the court explained that its

> holding in McMahon was *merely provisional*, turning in key part on the *limited nature of the factual record* in the case. Given the *lack of discovery* in the case, we explained that it was simply *too soon to tell* whether the plaintiff's suit would implicate political questions. [502 F.3d] at 1362. We expressly noted, however, that a *different conclusion might be reached* if the question were raised again after development of the record. Id. at 1362 n.31.

Ibid. (emphasis added).

Along the same lines, the court explained that in *Lane*, "*no discovery* had been taken in the case. . . . the court had a *very limited factual record* to rely upon in determining whether the suit would raise political questions." *Id.* 37a (emphasis added). "Thus, as in McMahon, the court's conclusion was *preliminary*." *Ibid.* (emphasis added).

In its opinion below the court of appeals emphasized that the present case is postured quite differently than *McMahon* and *Lane* inasmuch as discovery has been completed, and based on the jurisdictional evidence developed during discovery, concluded that the political question doctrine bars Petitioner's suit:

> By contrast, the record before us in this case has been fully developed, and based on our review of the record, it is *completely evident* that the suit would require us to review *many basic questions traditionally entrusted to the military*, and that we have *no judicially manageable standards* for adjudicating the issues in the case.

Id. at 36a-37a (emphasis added). This Court should let that conclusion stand.

II. THE COURT OF APPEALS CORRECTLY CONCLUDED, BASED ON A FULLY DEVELOPED RECORD OF JURISDICTIONAL EVIDENCE, THAT THE POLITICAL QUESTION DOCTRINE BARS ADJUDICATION OF PETITIONER'S SUIT

After an exhaustive analysis, the Eleventh Circuit held that this suit "inevitably would require [the court] to address matters that have been definitively entrusted to other branches of the government, and to adjudicate questions that defy resolution by any judicially manageable standards." Pet. App. 47a. That conclusion turns upon, and is limited to, the jurisdictional facts of this case. The court's opinion applies existing political question

jurisprudence to those facts. It does not announce any new legal principles. And contrary to the certiorari petition, it neither represents "an unprecedented expansion of the political question doctrine," nor provides military support contractors with "*de facto* immunity from suit." Pet. 2, 9, 12.

Instead, the opinion below reflects the principle that "different cases involving different claims require their own discriminating inquiry under *Baker*." *Lane*, 529 F.3d at 568. Petitioner's disagreement with the outcome of the Eleventh Circuit's (and district court's) *Baker* inquiry into the facts and posture of this case is not a sufficient reason for Supreme Court review.

The petition reprises Petitioner's futile and unsuccessful efforts in the district court and court of appeals to characterize this action as an "everyday" case of "simple negligence"—merely an instance of "careless driving" resulting in a "wreck" that supposedly was "solely caused" by Respondent Irvine, whose "responsibilities for KBR were the same as if he was driving back home." Pet. 2, 3, 16. But the petition's "'simplistic labeling of this case as a 'garden variety road wreck' . . . ignores the true nature of the circumstances giving rise to this tragedy.'" Pet. App. 32a (quoting *Whitaker*, 444 F. Supp. 2d at 1282). As the court of appeals unequivocally concluded, the battalion of nonjusticiable political questions that would confront the district court if Sgt. Carmichael's combat-zone personal injury suit were allowed to proceed to trial are both unmistakable and unavoidable.

First, as the court of appeals emphasized throughout its opinion, "the military's control over fuel-supply convoys was 'plenary' . . . thus ensuring that virtually any question concerning the convoy's mission would inevitably implicate military judgments." *Id.* 36a. The court explained, for example, that "[t]hese convoy missions were highly dangerous," and as a result, "the convoys were heavily militarized." *Id.* 4a. "[I]t is the military, not civilian contractors, that decides when convoys are to be arranged, the routes to be traveled, the amount of fuel or other supplies to be transported, the speed at which the vehicles are to travel, the number of vehicles to be included in the convoy, the spacing to be maintained between the vehicles, and the security measures to be employed, and other details of the mission." *Id.* 5a-6a.

Second, "given the extent to which the convoy was subject to military regulation and control, the question of whether Irvine acted reasonably or breached the standard of care cannot be answered by reference to the standards used in ordinary tort cases." *Id.* 31a. The court of appeals explained that

> [i]n the typical negligence action, judges and juries are able to draw upon common sense and everyday experience in deciding whether the driver of a vehicle has acted reasonably. But these familiar touchstones have no purchase here, where any decision to slow down could well have jeopardized the entire military mission and could have made Irvine and other vehicles in the convoy more vulnerable to an insurgent attack.

Id. 33a.

Third, Petitioner's circular assertions that her claims do not implicate military decisions because she has "not blamed the military in any way," Pet. 2, ignores how Respondents would *defend* this negligence suit if it were to go to trial, especially as to the element of causation. *See* Pet. App. 27a ("KBR would inevitably . . . try to show that unsound military judgments and policies surrounding every aspect of the . . . convoy were either supervening or concurrent causes of the accident.").

For example, as the court of appeals indicated, "any defense mounted by KBR or Irvine would undoubtedly cite the military's orders as the reason why Irvine did not reduce his speed." *Id.* 23a. KBRSI drivers were required to maintain both the speed and follow distance set by the U.S. military convoy commander who was in charge of the convoy at issue. *Id.* 5a-6a, 16a.[7] The record establishes that the military convoy commander failed to slow down

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[7] The Army explained in this case that "[t]he military convoy commander was in total command and control of the convoy, including setting the speed at which the convoy traveled [and] had the sole authority to initiate tactical measures relating to the convoy, including adjusting the convoy speed." Pet. App. 21a (quoting Declaration of Staff Sgt. Hansen, who was Team Leader of Sgt. Carmichael's convoy mission squad). The military convoy commander's directives were conveyed to the KBRSI civilian convoy commander (i.e., convoy foreman), who in turn conveyed them to KBSRI truck drivers such as Respondent Irvine. *See id.* 21a-22a.

the convoy in response to a warning about the jolting "S" curve in the road—a warning that a KBRSI truck driver several vehicles ahead of Respondent Irvine's vehicle radioed to all convoy personnel prior to the rollover incident. *Id.* 26a (citing Staff Sgt. Hansen's declaration). As part of its defense, "KBR would surely . . . argue that the military convoy commander was negligent in setting too fast a pace along the particularly treacherous route for the convoy, and in specifically ignoring evidence to this effect." *Ibid.* Even if Respondent Irvine had "flouted the military's orders," the "fact remains that Irvine's conduct was at all times governed by military rules and regulations (including timing, route, speed, and spacing), and any attempt to assess the reasonableness of Irvine's conduct would entail an examination of those rules and regulations." *Id.* 23a, 22a n.10.[8]

Petitioner's contention, therefore, that this is merely a case "that may touch on political issues," but "does not require the review of any military

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[8] The petition misplaces reliance on KBRSI's "internal investigation" of the rollover incident. Anecdotal assertions about the incident's causes and contributing factors in the Incident Report sheet filled out by KBRSI (R5-97, Ex. 4) cannot be isolated from the U.S. Army's decisionmaking and conduct in connection with the convoy at issue. Indeed, the petition fails to note that the Incident Report emphasized that "This Incident Occurred in a Combat Zone." Furthermore, as the court of appeals explained, "[t]he fact that KBR's investigation mentions only Irvine's conduct does not establish that Irvine was the sole cause of the accident." Pet. App. 24a.

decision," Pet. 11, 12, is incorrect. Petitioner concedes that a jury "would be asked whether KBR and Irvine exercised ordinary care *under the circumstances*"—which the petition acknowledges includes "the Army's choice of route [and] other Army decisions." *Id.* 13 (emphasis added). As the court of appeals concluded, "the circumstances under which the accident took place were *so thoroughly pervaded by military judgments and decisions*, it would be impossible to make any determination regarding Irvine's or KBR's negligence without bringing those essential military judgments and decisions under searching judicial scrutiny." Pet. App. 18a (emphasis added). Contrary to the petition, this clearly is not a case limited to the same negligence issues that would be involved in connection with a driving a "routine convoy . . . back home." Pet. 2, 3. Instead, "[g]iven the circumstances under which the accident in this case took place . . . the question before the Court would be what a reasonable driver subject to *military control* over his exact speed and path would have done. Pet. App. 31a, 32a (emphasis added). "Simply put, [courts] have no readily available judicial standard with which to answer this question." *Id.* 32a.[9]

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[9] Petitioner's analogy to an automobile accident in a poorly designed municipal intersection, Pet. 13, is inapt. Unlike the present case, a negligence suit involving such an accident would not implicate questions that are constitutionally committed to Congress or the Executive Branch, or for which no judicial standards exist.

The petition again misses the point of the political question doctrine by asserting, contrary to the record, that KBRSI exercised "exclusive control" over Respondent Irvine's work schedule, and that as a result of KBRSI's alleged negligent supervision of that schedule, Respondent Irvine was fatigued at the time of the rollover incident. Pet. 18. Even if that were true, any attempt to prove that KBRSI's alleged negligent supervision and/or Respondent Irvine's alleged fatigue was the sole cause of the accident would necessarily implicate "the potential causal role played by pivotal military judgments." Pet. App. 46a. Thus, the applicability, if any, of federal motor carrier work schedule regulations to Respondent Irvine's military fuel supply convoy activities in Iraq, *see* Pet. 17, is immaterial to the political question issue. Indeed, as the court of appeals confirmed, "[c]ourts are simply not equipped to pass judgment on the degree of supervision appropriately exercised over personnel charged with performing the tasks Irvine was charged with performing." Pet. App. 47a. Similarly, Judge Kravitch's partial concurrence and dissent—which would have remanded only the negligent supervision claim, and only for further jurisdictional findings, *id.* 56a—failed to appreciate the inextricable link between that claim and the nonjusticiable political questions that this suit unavoidably provokes.[10]

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[10] Despite the court's determination that Petitioner failed to preserve her so-called "negligent hiring" claim, *see* Pet. App. 41a, the petition alludes to that claim, *see* Pet. 2, 8, 18, and asserts that Respondent Irvine was "an unqualified driver," *id.* 2. The record indicates, however,

(footnote continued on next page)

Finally, although the court of appeals did not reach the third or fourth *Baker* political question formulations, Respondents submit that they, as well as the first two formulations, apply to this case. The third formulation relates to the "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Vieth*, 541 U.S. at 278 (citing *Baker*, 369 U.S. at 217). This third formulation applies here because the decision to use civilian contractors to provide overseas logistical services such as military fuel supply convoy support, the placement of military personnel in harm's way, and the levels of force protection and standards of interaction between military personnel and civilian contractors in hostile areas such as Iraq, necessarily require initial policy decisions clearly committed to the discretion of the military branches.

The fourth *Baker* formulation, "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government," *ibid.*, also applies here. This is because a judicial decision calling into question the military policies of the United States regarding its military efforts in Iraq during Operation Iraqi Freedom would express a lack of respect to both the Executive Branch and Congress.

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that Respondent Irvine had substantial experience driving fuel tankers in military support convoys, and that his only alleged "lack of qualification" for the job was an erratic blood pressure reading at the time he initially applied to KBRSI for employment. Respondent Irvine was hired several months later, after controlling his blood pressure with medication. *See* Pet. App. 8a, 8a n.7.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action File
Number 1:06-cv-507-TCB

ANNETTE CARMICHAEL, Individually and as Guardian for KEITH CARMICHAEL, an incapacitated adult,
Plaintiff,

v.

KELLOGG, BROWN & ROOT SERVICES, INC., HALLIBURTON ENERGY SERVICES, INC. and RICHARD IRVINE,
Defendants.

ORDER

I. Background

On May 22, 2004, Sergeant Keith. Carmichael, a soldier in the Milted States Army, was serving as a military escort for a convoy of trucks allegedly owned and. operated by Defendants Kellogg, Brown & Root Services, Inc. and Halliburton Energy Services, Inc. Carmichael was a passenger in a tractor-trailer driven by Defendant Richard Irvine, a civilian who, according to Plaintiff, was an employee of both Defendants.

While travelling from Logistics Support Area Anaconda to Al Asad, Iraq, Irvine lost control of the tractor-trailer and drove of the road, whereupon the tractor-trailer overturned in a ravine. Despite

wearing a seatbelt, Carmichael was partially ejected from the cab of the tractor. His head and chest were pinned between the tractor and the ground. Six to seven minutes passed before rescuers could dislodge his body. During this time he experienced a loss of oxygen to his brain. As a result, he suffered massive injuries and is now in a permanent vegetative state.

On February 1, 2006, Carmichael's wife, Plaintiff Annette Carmichael, individually and as her husband's guardian, filed this action in state court, alleging that Irvine negligently operated the tractor-trailer at an excessive speed and failed to maintain control of the tractor-trailer, thereby causing the accident. She claims that the corporate Defendants are vicariously liable for Irvine's allegedly negligent conduct under the doctrine of respondeat superior. She also contends that they are directly liable for negligently selecting, training and supervising Irvine.

All three Defendants have filed motions to dismiss the complaint, arguing two grounds. First, Defendants contend that Plaintiffs claims are nonjusticiable under the political question doctrine. Second, Defendants contend that as military defense contractors they are immune from liability under the combatant activities exception to the Federal Tort Claims Act ("FTCA").

II. Discussion

A. Standard on Motion to Dismiss

The law in. this Circuit governing motions to dismiss pursuant to Rule: 12(b)(6) for failure to state a claim is well settled. Dismissal of Plaintiffs claims is suitable only when no construction of the factual allegations will support the cause of action on the basis of a dispositive issue of law. *Marshall County*

Bd. of Ethic. v. Marshall County Gas Dist., 992 F.2d 1171, 1174 (11th 07.1993).

B. Defendants' Motions to Dismiss

1. Political Question

The political question doctrine is a function of the separation of powers among the three branches of government, and it "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986).

In *Baker v. Carr*, the Supreme Court set forth six elements indicative of a nonjusticiable political question:

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department;
>
> (2) a lack of judicially discoverable and manageable standards for resolving it;
>
> (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
>
> (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
>
> (5) an unusual need for unquestioning; adherence to a political decision already made; or
>
> (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. 186, 217 (1962). These tests are "probably listed in descending order of both importance and certainty." *Veith v. Jubelirer*, 541 U.S. 267, 278 (2004). At least one of these elements must be evident for the political question doctrine to apply. *Baker*, 369 U.S. at 217.

Defendants contend that the first element is implicated because Plaintiff's complaint necessarily raises issues that are committed to the discretion. of the political branches of government. Defendants argue that because the route and speed of convoys are set by the military and not by civilian drivers, the conduct of the military and its handling of supply convoys used to support ongoing military operations would necessarily be questioned were this case allowed to go forward.

Defendants also argue that the second factor applies to this case because no judicially manageable standards exist for the resolution of the issues. Defendants claim that if this case is not dismissed, the Court will be required to evaluate the conduct of both the military and Defendants without having any standards with which to do so.

Finally, Defendants claim that the third and fourth Baker factors apply because the standards of interaction between the military. and civilian contractors in a combat zone :require initial policy decisions clearly committed to the discretion of the political branches, and a judicial decision calling into question the conduct of the United States concerning its ongoing military efforts in Iraq would express a lack of respect due to the coordinate branches of government that oversee those war efforts.

In support of their argument, Defendants cite several cases barring claims because of the political question doctrine, including *Nejad v. United States*, 724 F. Supp. 753 (C.D. Cal. 1989); *Bentzlin v. Hughes Aircraft*, 833 F. Supp. 1486 (C.D. Cal. 1993); *Zuckerbraun v. Gen. Dynamics Corp.*, 755 F. Supp. 1134 (D. Conn. 1990); *Whitaker v. Kellogg Brown & Root, Inc.*, No. 4:05-CV-78, 2006 U.S. Dist. 45708 (M.D. Ga. July 5, 2006); and *Smith v. Halliburton Co.*, No. H-06-0462, 2006 U.S. Dist. LEXIS 61980 (S.D. Tex. Aug. 30, 2006).

The Court has reviewed the cases cited by the parties, as well as several other authorities, and concludes that the court in *Lessin v. Kellogg Brown & Root*, No. H-05-01853, 2006 U.S. Dist. LEXIS 39403 (S.D. Tex. June 112,, 2006), best states the test for cases in which a member of the United States military is injured or killed as a. result of the alleged negligence of a government defense contractor working with the military: the plaintiffs claims are barred by the political question doctrine if "military decision-making or policy would be a necessary inquiry, inseparable from the claims asserted." *Id.* at *7.

In *Lessin*, a member of the United States Army was providing a military escort for a commercial truck convoy. While en route to Kuwait, one of the convoy trucks suffered an equipment malfunction. The truck stopped at the side of the route and *Lessin* attempted to assist the driver. While doing so, he was struck in the head by the ramp assist arm for the truck and suffered a traumatic brain injury.

In support of its motion to dismiss plaintiffs complaint as nonjusticiable under the political question doctrine, the defendant cited *Nejad*, *Bentzlin* and *Zuckerbraun*. The court correctly distinguished these

cases on the ground that in each case, the court explicitly recognized that plaintiffs claims necessarily implicated military decision-making or policy.

Smith v. Halliburton Co., *supra*, also relied upon by Defendants here, is distinguishable on the same basis as *Nejad*, *Bentzlin* and *Zuckerbraun*; the plaintiffs claims, if allowed to proceed, would have required the court to "second-guess the decisions of the United States military, even though the suit is ostensibly against only military contractors." 2006 U.S. Dist. LEXIS 61980 at *20.[1]

The other case relied upon by Defendants is *Whitaker*, which was decided less than a month after *Lessin*.[2] The *Whitaker* case involved a soldier who was providing an armed escort for a military supply convoy. He stopped his vehicle on a bridge over the Tigris River after a vehicle in front of him hit the guard rail and fell off the bridge. Another driver struck Whitaker's vehicle from behind, knocking it close to the edge of the bridge where the guard rail had been destroyed. Whitaker tried to extricate himself from the vehicle, whereupon he fell into the river and drowned. The court found that because the convoy operation was planned by the military and the military determined the placement of vehicles in the convoy, the speed of the convoy and the distance

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[1] The court in *Smith* granted the defendants' renewed motion to dismiss, which was filed after discovery was conducted. The Court had previously denied the defendants' original motion to dismiss—also predicated on the political question doctrine—because of its reluctance to dismiss the complaint "[a]t this early stage of the litigation." *See Smith v Halliburton Co.* No. H-06-0462, 2006 U.S. Dist. LEXIS 30530 at *14 (S.D. Tot. May 16, 2006). This Court shares the same reluctance.

[2] The opinion in *Whitaker* does not cite the *Lessin* decision.

between vehicles in the convoy, inquiries regarding military decision-making would be inextricable from the plaintiffs' claims.

The Court respectfully disagrees with the holding in *Whitaker* and chooses instead to follow the holding in *Lessin*. The Court finds that at this stage of the proceedings it is not yet certain whether inquiries into military decision-making would be necessitated by Plaintiff's claims. The discovery period has just begun, and because of the limited facts, it is impossible to say with certainty whether this case will involve a nonjusticiable political question. For example, it is conceivable that at the time of the accident Defendant Irvine was driving the truck within the speed limit set by the military yet in a manner that was negligent in some other respect. In that event, the political question doctrine would not necessarily bar Plaintiff's claims.

Because the Court cannot at this stage of the proceedings determine that any of the factors set forth in *Baker* apply to Plaintiffs claims, Defendants' motions must be denied to the extent they are based upon the political question doctrine. If additional facts appear during the discovery period that are germane to Defendants' political question argument, Defendants may renew their motions to dismiss on this ground.

2. Federal Tort Claims Act

Defendants also argue that Plaintiffs state law claims are preempted by federal law—the combatant activities exception to the Federal Tort Claims Act ("FTCA")-and therefore barred.

The FTCA constitutes a limited waiver of sovereignty by the United States from civil suit and dam-

ages, with certain exceptions. One such exception is the combatant activities exception, which excludes "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during a time of war." 28 U.S.C. 2680(j).

Defendants acknowledge that the express terms of the FICA, provide a waiver of immunity (and exceptions to that waiver of immunity) only to the United States Government, not private parties. However, Defendants contend that in two cases—*Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992), and *Bentzlin v. Hughes Aircraft*, 833 F. Supp. 1486 (C.D. Cal. 1993)—the combatant activities exception to the waiver of immunity has been extended to government contractors.

To consider Defendants' argument, it is necessary to analyze not only *Koohi* and *Bentzlin*, but also the Supreme Court opinion upon which the immunity defense provided by those two cases is founded: *Boyle v. United Technologies Corporation*, 487 U.S. 500 (1988).

David Boyle was a U.S. Marine helicopter copilot who was killed when his helicopter crashed during a training exercise. Although he survived the impact of the crash, he was unable to escape from the helicopter, and drowned. His father sued the Sikorsky Division of United Technologies Corporation ("Sikorsky"), which built the helicopter for the United States.

Plaintiff presented two theories of liability under state tort law. First, he alleged that Sikorsky had defectively repaired a device called the servo in the helicopter's automatic flight control system, which allegedly malfunctioned and caused the crash. Second, he alleged that Sikorsky had defectively

designed the copilots emergency escape system the escape hatch opened out instead of in (and was therefore ineffective in a submerged craft because of water pressure), and access to the escape hatch handle was obstructed by other equipment.

The Supreme Court framed the issue as follows: "This case requires us to decide when a contractor providing military equipment to the Federal Government can be held liable under state tort law for injury caused by a design defect." 487 U.S. at 502, 108 S. Ct. at 2513 (emphasis added). Stated differently, the Court considered whether the plaintiffs state law tort claims were preempted by federal common law, despite the absence of federal legislation specifically immunizing government contractors.[3]

The Court held that in a few areas involving "uniquely federal interests," state law is preempted and replaced, where necessary, by federal law if a "significant conflict" exists between an identifiable federal policy or interest and the operation of state law, or if the application of state law would frustrate specific objectives of federal legislation. In such cases, the content of the federal law is prescribed by the courts (absent explicit statutory directive).

Applying this two-step process to determine whether the plaintiffs state law claims were preempted, the Court first considered whether the

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[3] It is important to note that the government contractor defense created by *Boyle* results in the preemption of certain state law causes of action, not a grant of immunity to contractors. In footnote 1 of its opinion in *Boyle* the Court expressly slated that it was not addressing the issue of immunity, "as it is not before us." 487 U.S. at 505 n.1.

subject matter at issue was an area of uniquely federal interest. The Court identified the area at issue as "the civil liabilities arising out of the performance of federal procurement contracts." 487 U.S. at 506.

The Court then found that the state law-imposed duty of care (the duty to equip helicopters with the sort of escape-hatch mechanism that the plaintiff claimed was necessary) conflicted with the duty imposed by the Government contract (the duty to manufacture and deliver helicopters with the sort of escape-hatch mechanism shown by the specifications).

Next, the Court had to determine whether the conflict between the state tort law and the area of uniquely federal interests was "significant." The Court expressed concern that, absent some limiting principle, conflicts between state tort law and areas of uniquely federal interests would too often be deemed "significant," resulting in preemption of state law.

As an example, the Court offered a hypothetical in which a federal procurement officer orders, by model number, a quantity of stock helicopters that happen to be equipped with escape hatches opening outward. In such a case it could not be said that the Government has a significant interest in that particular feature because the Government, i.e., the procurement officer, gave no consideration to the outward-opening feature of the escape hatch when he placed the stock order for the helicopters. Thus, in such a case it could not be said that the conflict between state tort law and "the civil liabilities arising out of the performance of federal procurement contracts" was "significant."

Rather, there must be a limiting principle to identify those situations *in which a "significant"* conflict with federal policy or interests exists. The Court found such a limiting principle in the discretionary function exception to the FTCA. That exception exempts the Government from civil liability on any claim based upon the Government's exercise or performance, or the failure to exercise or perform, a discretionary function. 28 U.S.C. § 1346(b).

The Court stated that the selection of the appropriate design for military equipment used by our Armed Forces is "assuredly a discretionary function" since it often involves "not merely engineering analysis but: judgment as to the balance of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness." 487 U.S. at 511.

Having waded through the foregoing analysis, the Court held that state tort law that imposes liability for design defects in military equipment is displaced where (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about dangers in the use of the equipment known to the supplier but not to the United States.

Having described the Supreme Court's holding in *Boyle*, the Court now looks at the two cases cited by Defendants—*Koohi* and *Bentzlin*—which purport to be premised upon *Boyle*.

In *Koohi*, a U S. warship equipped with the Aegis air defense system mistook a civilian Iranian airplane for an Iranian F-14 and shot it down, killing all 290 persons aboard. The plaintiffs-heirs of some of

the deceased passengers and crew-sued the United States for negligent operation of its warship and sued the weapons manufacturers for design defects in the Aegis system"

Citing *Boyle*, the court held that the claim against the defense contractors was preempted—not by the MA's discretionary function exception to immunity, but by the FTCA's combatant activities exception, 28 U.S.C. § 2680(j). Thus, at the outset it should be noted that the government contractor defense created in *Boyle* differs from the defense created in *Koohi*. The former was rooted in the discretionary function exception to the FTCA's waiver of government immunity, whereas the latter was rooted in the combatant activities exception.

"The court's reasoning in *Koohi* was that one of the purposes of the combatant activities exception is to recognize that during wartime, no duty of care is owed to those against whom military force is directed. The court reasoned that imposing liability on the civilian manufacturer of a weapons system used in an accidental shooting of a civilian aircraft "would create a duty of care where the combatant activities exception is intended to ensure that none exist." *Id.* at 1336-37.

Significantly, most of the Ninth Circuit's opinion in *Koohi* is devoted to issues other than whether the plaintiffs' state law tort claims against the government contractor should be preempted by federal law. The majority of the opinion addresses (1) whether the political question doctrine barred all of the claims" and (2) whether the *government* was immune to the plaintiffs' claims under the FTCA and the Public Vessels Act.

Just one paragraph of the court's opinion in *Koohi* is devoted to the issue of whether the plaintiffs' claim against the defense contractors was preempted in accordance with *Boyle*. And that one paragraph is conclusory, not analytical.

Moreover, the court focused on the fact that no duty of care is owed to those against whom military force is directed, which is understandable because the force at issue in that case was directed by the Government against a perceived enemy (an Iranian F-14 aircraft). Here, Plaintiff's husband was not injured because by the United States because he was perceived as its enemy; rather, Sergeant Carmichael was a United States soldier/citizen injured (allegedly) by a private contractor.

Finally, *Koohi* represents an expansion of the holding in *Boyle* that the Supreme Court may or may not have intended. And *Koohi* is not binding in this circuit.

For all of these reasons, this Court is not inclined to follow the Ninth Circuit's opinion in *Koohi*.

The other case cited by Defendants that purports to be based upon the Supreme Court's holding in *Boyle* is *Bentzlin v. Hughes Aircraft Company*, a district court opinion from the Central District of California. In *Bentzlin*, the plaintiffs were family members of six Marines who were killed in combat during Operation Desert Storm in the course of the Persian Gulf War. The Marines were riding in a vehicle toward enemy Iraqi forces when a Maverick AGM-65D missile, fired from a U.S. Air Force A-10 aircraft, struck the vehicle and killed the Marines. Plaintiffs claimed that a product defect caused the missile to deviate from its intended target and strike the Marines.

Recognizing *Boyle*'s bar of state tort law *design* defect claims, the plaintiffs alleged that their claims arose from a *manufacturing* defect. But the court dismissed the action anyway, holding that *Boyle*'s government contractor defense extended to both design and manufacturing defect claims.

Central to the court's well-reasoned holding in *Bentzlin* was its finding that allowing state tort law claims based upon the Maverick missile's alleged defective condition would necessitate the disclosure of the missile's design, which would contravene the Government's strong interest in preserving the secrecy of its weaponry. Obviously, such a finding would tend to compel the conclusion that, in accordance with. the test prescribed in *Boyle*, Plaintiffs' claims were preempted (since those claims, if allowed, would create a substantial conflict between state tort law-imposed duties and the Government's obvious, and uniquely federal, interest in preserving the secrecy of its weaponry).

Also important to the court in *Bentzlin* was the fact that the Government had intervened in the case and moved to dismiss under the political question and state secrets doctrines. The court recognized the "longstanding rule" that liability for manufacturing defects exists against government contractors "unless the government has formally taken a position that such a suit should not be maintained." *Id*. at 1491 n.8.

Significantly, none of these factors is present in the instant case. It does not yet appear that allowing Plaintiff to proceed with her state tort law claims would contravene the Government's interest in preserving military secrets. And the Government

has riot intervened in this case and moved to dismiss under the political question or state secrets doctrines.

Two district courts—both from the Southern District of Texas—have recently distinguished *Bentzlin* and allowed claims to proceed against military contractors: *Fisher v. Halliburton*, 390 F. Supp. 2d. 610 (S.D. Tex. 2005), and *Lessin*, *supra*.

In *Fisher*, the court distinguished *Boyle* and *Koohi* on the ground that they presented claims involving complex, allegedly defective equipment provided by government contractors to the United States for military use, in circumstances, i.e., the Government's procurement process, "which inevitably implicates nuanced discretion and sophisticated judgment by military experts." *Id.* at 616. Noting that the plaintiffs' claims did not involve any allegations that the Defendants had supplied equipment, defective or otherwise, to the military, the court concluded that "extension of the government contractor defense beyond its current boundaries is unwarranted." *Id.*

In *Lessin*, the plaintiff', like the Plaintiff's husband in this case, was a soldier who was providing a military escort for a commercial truck convoy allegedly owned, operated or controlled by Defendant. While attempting to assist the driver of a truck that had suffered an equipment malfunction, *Lessin* was struck in the head by the ramp assist arm for the truck and suffered a traumatic brain injury. 2006 U.S. Dist. LEXIS 39403 at *1-2.

Lessin sued Kellogg, Brown & Root, alleging that it was negligent in inspecting, maintaining and repairing; the truck that injured him, and in supervising the driver who was operating the truck. Lessin also alleged that the truck driver was negligent in

using the ramp assist arm of the truck, and in failing to warn Lessin.

The court denied the defendant's motion to dismiss, finding that the "vital distinction" between that case and *Fisher*, on the one hand, and *Koohi* and *Bentzlin*, on the other, was the military's role in the incident at issue:

> In both *Koohi* and *Bentzlin*, the injuries at issue arose from the United States' use of weapons during combat. Thus" as the court held in *Fisher*, "each of these cases involved claims involving complex equipment acquired by the Government in its procurement process, which inevitably implicates nuanced discretion and. sophisticated judgments by military experts." *Id.* at 616. Such military decision-making is not implicated here, where, instead of manufacturing weapons, which were then procured and utilized by the military in combat, Defendant itself provided a convoy service. Additionally, in *Koohi*, the court was also concerned with the lack of any duty of reasonable care owed to a perceived enemy during combat. This case, on the contrary, concerns the duty of care owed by a private corporation to United States citizens, and the concern noted by the court in *Koohi* is inapplicable to this case.
>
> In the absence of additional authority, and in light of the distinctions between the *Koohi* and *Bentzlin* cases and the case at bar, the Court declines to extend the combatant activities exception. Accordingly, Defendant's motion to dismiss this case as barred by the combatant activities exception to the FTCA is denied. Again, dismissal is without prejudice to Defen-

dant's right to renew the motion if facts adduced in discovery so warrant.

2006 U.S. Dist. LEXIS 39403 at *14-15.

As with the issue of the applicability of the political question doctrine, the Court finds that the district court's opinion in *Lessin* is persuasive and should be followed. Furthermore, *Koohi* and *Bentzlin* represent expansions of the holding in *Boyle* that the Supreme Court may or may not have intended. And neither case is binding in this circuit.

Accordingly, the Court concludes that Defendants have failed to show that as a. matter of law the combatant activities exception to the FTCA's grant of immunity applies to this case and that Plaintiffs claims therefore are preempted and should be dismissed. As with Defendants' motion to dismiss based upon the political question doctrine, if additional facts appear during the discovery period that are germane to Defendants' FTCA argument, Defendants may renew their motions to dismiss on this ground.

III. Conclusion

For all of these reasons, Defendants' motions to dismiss [4 and 6] are DENIED.

IT IS SO ORDERED this 19th day of September, 2006.

/s/ Timothy C. Batten, Sr.
Timothy C. Batten, Sr.
United States District Judge

(4)

No. 09-683

Supreme Court, U.S.
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In The
Supreme Court of the United States

ANNETTE CARMICHAEL, Individually, and as Guardian for KEITH CARMICHAEL, an incapacitated adult,
Petitioners,

v.

KELLOGG, BROWN & ROOT SERVICES, INC., HALLIBURTON ENERGY SERVICES, INC. and RICHARD IRVINE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

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SUPPLEMENTAL BRIEF FOR THE PETITIONERS

This supplemental brief is submitted in response to the Brief for the United States as Amicus Curiae. In the government's brief, the Acting Solicitor General seems to agree that the Eleventh Circuit erred and reached the wrong conclusion under the political question doctrine, and agrees that the issues presented in this case are important, recurring, and directly implicate the interests of the United States. Despite acknowledging the importance of the case, the Acting Solicitor General recommends that the Court deny the petition. It is precisely due to the importance of the issues presented in this case, however, that the Court should grant the petition in its entirety.

I. The Solicitor General Does Not Dispute That The Eleventh Circuit Erred.

The Solicitor General does not dispute, and indeed seems to agree, that the court of appeals erred in holding that this case is barred by the political question doctrine. Brief of the United States, pp. 9, 14, 16 & 18. In its brief the government answers its Question Presented – whether the political question doctrine bars the adjudication of negligence claims against a civilian military contractor arising from the crash of a civilian-contractor vehicle during a military fuel convoy in Iraq – in the negative. Yet the Acting Solicitor General asks this Court to let stand an erroneous decision by the court of appeals that held as a constitutional matter that these lawsuits are barred.

The court of appeals' holding precludes the further percolation in the courts below that the Acting Solicitor General advocates for. Because the Eleventh Circuit held that courts do not even have subject matter jurisdiction to hear cases against civilian contractors in Iraq, there is no reason for courts to hear the other defenses the Acting Solicitor General says may be available to civilian contractors. The court's error constitutionalizes, and therefore freezes into place, a defense the Acting Solicitor General agrees is inapplicable. If this Court denies the petition, the Eleventh Circuit's decision will stand with a very significant imprimatur, and courts will follow it in erroneously dismissing cases against civilian contractors in Iraq and Afghanistan on political question grounds.

The Acting Solicitor General further argues that there is no conflict among the circuits, therefore the Court should allow further percolation to consider other defenses to these suits. Brief of the United States, p. 9. The Acting Solicitor General seems to intimate that because of the important nature of these cases, this Court should review a civilian contractor case at some point, just not this one that was wrongly decided. There is no reason for the Court to wait for a circuit split. There is ample evidence that the political question doctrine cannot be applied to these cases in a principled way, there is already a split within the Eleventh Circuit on how the political question doctrine applies. The conflicting rulings by the Eleventh Circuit in this case and in *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007), and between the district court's opinions in this case on the first motion to dismiss, *Carmichael v. Kellogg, Brown & Root Services, Inc.*, 450 F. Supp. 2d 1373 (N.D. Ga.

2006), and on the renewed motion to dismiss, *Carmichael v. Kellogg, Brown & Root Services, Inc.*, 564 F. Supp. 2d 1363 (N.D. Ga. 2008), demonstrate that the political question doctrine is not being applied consistently. There is no principled way to distinguish those rulings.

The *de facto* immunity from negligent conduct that the Eleventh Circuit has provided contractors removes the important incentive that the risk of paying financial damages is to for-profit companies. The evidence shows that Mr. Irvine was overworked and unskilled. Despite this, KBR put him behind the wheel of a tanker that was transporting fuel for the war effort. After Mr. Irvine wrecked, catastrophically injured Sgt. Carmichael, delayed the fuel convoy, and lost the fuel on his tanker, the Eleventh Circuit's opinion immunizes KBR from suit. As a result, the United States will have to shoulder the costs of caring for Sgt. Carmichael and KBR no longer has the incentive to ensure that on future convoys it puts only well-rested and skilled employees behind the wheel of its vehicles.

If a soldier was driving the tanker, the military would have properly trained the soldier and made sure the soldier could safely perform the task. When a private contractor is providing the driver, the military must depend on the contractor to hire and train good drivers. If the contractor fails to meet these standards and injures someone as a result, the contractor should be held to account.

The effect of the Eleventh Circuit's opinion is not to protect the executive from judicial interference with executive decision making but to saddle the executive

with the cost of non-military blunders by civilian for-profit contractors, and to remove an important incentive to the for-profit contractors to properly hire and train its employees. If the political branches want to limit jurisdiction for these suits, they can do it in a much more nuanced way and in a way that enhances the war fighting capacity of the armed forces.

II. The Solicitor General Agrees That The Issue Presented In This Case Is Important And Recurring.

The Acting Solicitor General agrees that these cases against private military contractors in Iraq and Afghanistan directly implicate the interests of the United States and that the cases are recurring. Both of those facts weigh heavily in favor of this Court granting the petition. An erroneous decision by the Eleventh Circuit should not stand as final precedent on such an important issue. A recurring issue that touches on the relationship between the judicial and executive branches in the context of the war should be decided by this Court, not a court below.

The issue of contractor liability is recurring and confused. There is no reason to wait for a circuit split. Circuits are already divided on how to handle these cases. Currently before the Court is the petition for *certiorari* in *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), petition for cert. pending, No. 09-1313 (filed Apr. 26, 2010), where the D.C. Circuit dismissed a case against a civilian contractor on the grounds that the claims are impliedly preempted by the combatant activities exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(j). In *Taylor v. Kellogg, Brown & Root Services, Inc.*, 2010 U.S. Dist. LEXIS 50610 (E.D. Va.

2010), *appeal docketed*, No. 2:09cv341 (4th Cir. May 13, 2010), the court dismissed a case against KBR on political question grounds, relying in part on the Eleventh Circuit's ruling in this case, and on the combatant activities exception theory in the *Saleh* case. To promote the orderly handling of these recurring civilian contractor cases, the Court should grant our petition and set forth how courts should handle these cases.

Whether the separation of powers forecloses courts from hearing personal injury cases against military contractors for acts that occur within the context of the war effort is an important question that should be answered by this Court alone. Questions about the relationship between the judiciary and the political branches during wartime should be answered by the Supreme Court, not lower courts. The judiciary should speak with one voice on the doctrine of separation of powers as it impacts war powers.[1]

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[1] Petitioners stated in the petition that based on our research the opinion below was the first time an appellate court had dismissed a case against a private contractor on political question grounds. Our subsequent research rechecking that question revealed that we were incorrect. In *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007), family members of people who were killed when the Israeli Defense Forces bulldozed homes in the Palestinian Territories with equipment manufactured by Caterpillar sued Caterpillar contending that Caterpillar should have known the equipment was going to be used in violation of international law. The undisputed evidence was that the United States approved and financed the sale. The Ninth Circuit held that a decision in the case would intrude on the government's decision to grant military aid to Israel and affirmed dismissal on political question grounds.

The Acting Solicitor General rightly states that the United States has significant interests in ensuring that military decisions are not subject to judicial second-guessing, in protecting soldiers, in making sure contractors are willing to provide the military with services, in ensuring that contractors exercise proper care in minimizing risks to service members and civilians, and do not escape responsibility for misconduct. Brief of United States, p. 9. However, effectively immunizing private contractors from negligence claims by invoking the political question doctrine is not the proper or most effective way to balance these interests.

CONCLUSION

This Court should grant the petition and exercise its jurisdiction.

Respectfully submitted,

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Dated: June 2010

No. 09-683

In the Supreme Court of the United States

ANNETTE CARMICHAEL, INDIVIDUALLY AND AS GUARDIAN FOR KEITH CARMICHAEL, PETITIONER

v.

KELLOGG, BROWN & ROOT SERVICE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the political question doctrine bars the adjudication of state law negligence claims brought on behalf of a United States service member against a civilian contractor arising from the crash of a contractor-operated vehicle during a military fuel convoy in Iraq.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

The Logistics Civil Augmentation Program (LOGCAP) permits private companies to enter into contracts with the United States Army to provide logistical support services in connection with ongoing combat and other operations. The program allows "civilian contractors to perform selected services in wartime to augment Army forces," to "fill shortfalls," and to relieve military units so they can focus on "other missions." Army Reg. 700-137, at 1-1 (Dec. 16, 1985). The question presented

in this case arises from a vehicle crash that occurred while Kellogg, Brown & Root Services, Inc. (KBR) was providing fuel convoy transportation services to the Army in Iraq through a LOGCAP contract. Petitioner is the wife of United States Army Sergeant Keith Carmichael, who was seriously injured in the crash; respondents are the driver of the fuel tanker truck, Richard Irvine, and his employer, KBR.[1]

1. On May 22, 2004, Sergeant Carmichael was assigned as a military escort, or "shooter," to ride in a tanker truck driven by Irvine as part of a fuel supply convoy in Iraq. Pet. App. 7a-8a. The military established the basic parameters for the convoy and the mission was led by the military convoy commander. *Id.* at 5a. Among other things, the military decided the route the convoy would take, the amount of fuel and other supplies to be transported, the overall speed at which the vehicles would travel, the number of vehicles to be included, the spacing to be maintained between vehicles, and the security measures to be employed. *Id.* at 5a-6a & n.5; Pet. 3. KBR's drivers were responsible for safely operating their vehicles. Pet. App. 70a-71a ("Of course the driver is responsible for keeping his truck on the road" and for "apply[ing] his truck's brakes."); Pet. 3-4.

Irvine's truck was the sixth tanker in a convoy of roughly 15 vehicles, and approximately seven military gun trucks were positioned between the tankers. Pet. App. 7a-8a. The military convoy commander had directed the convoy to travel a roadway known as "ASR Phoenix" at a speed of between 50 and 60 miles per hour, to maintain a distance of 100 meters between vehicles,

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[1] Halliburton Energy Services, Inc., which was the parent company of KBR until 2007, is also a respondent. Pet. App. 3a n.1.

and to follow the tire tracks of the preceding vehicle. *Id.* at 6a. After several hours, the military gun truck at the head of the convoy alerted the others to a series of approaching "S-curves." Although each vehicle traveling ahead of Irvine successfully negotiated the turns, Irvine lost control of his vehicle on the second curve. His truck slid off the road, rolled over, and pinned Sergeant Carmichael beneath it. Rescuers were eventually able to dislodge him, but Sergeant Carmichael suffered severe brain injuries due to a lack of oxygen and has remained in a persistent vegetative state. *Id.* at 8a-9a.

After the incident, KBR conducted an internal investigation and concluded that the crash occurred because Irvine was traveling at an "excessive speed while negotiating a curve [and] not paying attention to surroundings." Pet. App. 9a n.8; Pet. 5 (finding that the "root cause * * * was speed in excess and failure to control the vehicle") (citation omitted). Irvine had been hired by KBR as a driver at age 66, after initially being rejected for failing a medical exam, and had submitted time cards for more than 75 hours of work in the six days preceding the accident. Pet. App. 8a n.7, 50a-53a & nn.2, 4. After the investigation, KBR permanently barred Irvine from driving tanker trucks. Pet. App. 9a n.8.

2. Petitioner filed suit in Georgia state court, alleging that Irvine was negligent because, *inter alia*, he drove at an excessive speed "under the circumstances," did not keep a proper lookout, and failed to inspect his vehicle before operating it. Pet. App. 10a. Petitioner sought to hold KBR vicariously liable for Irvine's negligence and directly liable for negligently hiring, training, supervising, and retaining Irvine. *Ibid.*

Respondents removed the case to federal court and moved to dismiss, arguing that petitioner's claims were nonjusticiable under the political question doctrine and preempted under the "combatant activities" exception to the Federal Tort Claims Act (FTCA), 28 U.S.C. 2680(j). Br. in Opp. App. 2a. The district court denied the motion. *Id.* at 1a-17a. On the political question doctrine, the court recognized that petitioner's claims would be barred if "military decisionmaking or policy would be a necessary inquiry, inseparable from the claims asserted," *id.* at 5a (citation omitted), but concluded that "at this stage of the proceedings it is not yet certain whether inquiries into military decision-making would be necessitated by [petitioner's] claims," *id.* at 7a. "For example," the court explained, Irvine could have been "driving the truck within the speed limit set by the military yet in a manner that was negligent in some other respect." *Ibid.* As for preemption, the court questioned whether *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988), should be extended beyond the scope of the FTCA's discretionary function exception and determined that petitioner's claims were not preempted under the combatant activities exception in any event because they did not involve the procurement of complex military equipment, nor did they involve use of weapons by the military against enemies in combat. Br. in Opp. App. 14a-16a. The court invited respondents to renew their motion to dismiss if discovery revealed additional evidence supporting either defense. *Id.* at 7a, 17a.

After completing discovery, which involved Department of Army documents and personnel, respondents filed a renewed motion to dismiss on political question

grounds.[2] Br. in Opp. 6-7. This time the district court granted the motion, relying on new evidence uncovered in discovery. The court found that the first and second *Baker* v. *Carr*, 369 U.S. 186 (1962), factors—*i.e.*, a textually demonstrable commitment to another branch of government and the absence of judicially manageable standards—were satisfied. Pet. App. 57a-77a.

3. A divided panel of the court of appeals affirmed. Pet. App. 1a-56a.

a. On the first *Baker* factor, the court concluded that adjudicating petitioner's negligent driving claim "would require reexamination of many sensitive judgments and decisions entrusted to the military in a time of war" because "military judgments governed the planning and execution of virtually every aspect of the convoy in which Sergeant Carmichael was injured." Pet. App. 16a. "At the broadest level," the court noted, these judgments included, *inter alia*, "the military's decision to utilize civilian contractors in conducting the war in Iraq" because the rollover "never would have taken place" if such decisions had not been made. *Ibid.* More specifically, the court continued, the military controlled the timing of the convoy's departure, the speed of the vehicles, the route to be taken, the spacing between vehicles, and the measures needed to ensure the convoy's security. *Ibid.* The court found it "impossible" to make any judgment regarding Irvine's or KBR's negligence "without bringing those essential military judgments and decisions under" the type of "searching judicial scrutiny * * * that the political question doctrine forbids." *Id.* at 18a-19a.

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[2] Respondents did not renew their motion to dismiss based on the combatant activities exception. Pet. App. 59a n.1.

The court then rejected each of petitioner's arguments. Pet. App. 19a-30a. First, the court found that neither KBR nor Irvine retained control of the convoy in any relevant sense. The court reasoned that although contractor employees were "not under the direct supervision of military personnel in the chain of command," *id.* at 20a (citing Army Reg. 715-9, at 3-2(f) (Oct. 29, 1999)), the military gave orders to the KBR convoy commander, who relayed them to employees, and, if violated, the military could demand that the employee be replaced, *id.* at 19a-21a. And, the court explained, even though "Irvine had physical control over his tanker," "he was operating at all times under orders and determinations made by the military" and would "undoubtedly cite the military's orders as the reason why [he] did not reduce his speed." *Id.* at 22a-23a.

Second, the court was "unpersuaded" that it would not have "to *review* any of those military judgments" to adjudicate the case because petitioner had "not come close to showing" that "Irvine *alone* was responsible for the accident." Pet. App. 23a-25a. Instead, the court thought it "perfectly plausible" that military decisions may have "contributed to the rollover," "that Irvine's fault for the accident was negligible or nonexistent," and that "KBR would inevitably (and not without substantial evidential foundation) try to show that unsound military judgments and policies surrounding every aspect of the May 22 convoy were either supervening or concurrent causes of the accident." *Id.* at 25a-27a.

Finally, the court rejected petitioner's argument that litigating this case would not involve scrutiny of military judgments "traditionally insulated from judicial review," because, the court determined, decisions "concerning how to safely deliver vital military supplies through hos-

tile territory in war time" are "'professional military judgments' * * * properly insulated from judicial review." Pet. App. 29a-30a (quoting *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973)).

b. On the second *Baker* factor, the court found no judicially manageable standards to resolve petitioner's negligent driving claim. Pet. App. 30a-40a. Although sounding in negligence, the court determined that "the question of whether Irvine acted reasonably or breached the standard of care cannot be answered by reference to the standards used in ordinary tort cases." *Id.* at 31a. Instead, the court would have to ask "what a reasonable driver subject to military control over his exact speed and path would have done," and would have to take into account the fact that "any decision to slow down could well have jeopardized the entire military mission and could have made Irvine and other vehicles in the convoy more vulnerable to an insurgent attack." *Id.* at 31a-33a.

The court acknowledged that its earlier opinion in *McMahon* v. *Presidential Airways, Inc.*, 502 F.3d 1331, 1364 (2007), had found the negligence standard adaptable to a crash (in that case, of a contractor plane carrying troops in Afghanistan) occurring "in a less than hospitable environment," but found that case distinguishable because, among other things, the decision was based on a limited factual record. Pet. App. 35a-37a. The court distinguished the Fifth Circuit's decision in *Lane* v. *Halliburton*, 529 F.3d 548 (2008), also involving a fuel convoy in Iraq, "[f]or largely the same reasons." Pet. App. 37a (noting that, like *McMahon*, the decision in *Lane* was preliminary). Finding "no readily ascertainable and judicially manageable standards to * * * determin[e] or apportion[] Irvine's, KBR's, and the military's respective degrees of liability," the court affirmed

the dismissal of petitioner's negligent driving claim. *Id.* at 40a.

c. On direct liability, the court held that only the negligent training and supervision claims had been preserved, but that those claims were also barred by the political question doctrine. Pet. App. 41a-47a. Adjudicating the negligent training claim, the court explained, would raise questions about "military training" because even if the military did not directly provide any of Irvine's training, "KBR's drivers received instruction regarding some techniques directly from the military," because "KBR employees were trained according to military standards," and because courts have no readily available standards upon which to judge the adequacy of such training. *Id.* at 41a-44a. The court found that the negligent supervision claim could not proceed for similar reasons—namely, because "[t]his claim would undeniably require [petitioner] to show that Irvine's driving was *the* sole cause of the accident, that Irvine's poor driving was due to fatigue, and that Irvine's fatigue was the result of KBR's supervisory practices." *Id.* at 44a-46a.

d. Judge Kravitch issued a separate opinion, concurring in part and dissenting in part. Pet. App. 48a-56a. She agreed that the negligent driving claim was nonjusticiable, but dissented from the dismissal of petitioner's negligent supervision claim. *Id.* at 48a. Because "the district court made no factual finding as to whether the military was involved in setting the drivers' work schedules or was responsible for selecting specific drivers for its missions," Judge Kravitch found the record inadequate "to determine whether consideration of the negligent supervision claim would require the reexamination of a military decision." *Ibid.*

DISCUSSION

This case concerns only one of several defenses potentially available to private contractors facing tort suits arising from their actions in Iraq and Afghanistan. The court of appeals appropriately recognized the need to ensure that courts do not second-guess sensitive military judgments. And although it may have reached the wrong conclusion under the political question doctrine, review by this Court is not warranted. There is no conflict among the courts of appeals on this issue, other legal doctrines may be available to bar a suit or limit liability in circumstances such as these, and further percolation is needed to consider the full array of defenses implicated by this complex and developing area.

1. The United States has significant interests in ensuring that sensitive military judgments are not subject to judicial second-guessing, in protecting soldiers and civilians from wartime injuries, and in making sure contractors are available and willing to provide the military with vital combat-related services. At the same time, the United States also has significant interests in ensuring that its contractors exercise proper care in minimizing risks to service members and civilians and do not avoid appropriate sanctions for misconduct. Contractor misconduct resulting in harm to local nationals abroad also in some circumstances can have significant negative foreign policy implications for the United States. In recent years, an increasing number of lawsuits have been filed against private contractors asserting tort claims arising out of logistical support services provided in Iraq and Afghanistan. These cases directly implicate the interests of the United States.

The development of the body of law applicable in such cases, however, is in its infancy. The courts have just begun to flesh out how a variety of statutory, common law, and constitutional defenses should be applied in these novel and challenging circumstances. And while there are a number of such cases currently pending before the district courts, only a handful have undergone appellate scrutiny and only then on limited issues.

Injuries suffered in combat zones by service members, contractor employees, and other civilians are some of the most severe tragedies to befall the individuals concerned and the United States. Nonetheless, such injuries are often not compensable with monetary damages under the ordinary tort system. Service members injured or killed in service to this country are entitled to statutory disability and death benefits that "compare extremely favorably with those provided by most workmen's compensation statutes." See *United States* v. *Johnson*, 481 U.S. 681, 690 (1987) (quoting *Feres* v. *United States*, 340 U.S. 135, 145 (1950)). But service members cannot recover in tort against the United States. The *Feres* doctrine bars suits by service members for injuries incurred "incident to service." See 340 U.S. at 146. As the Court explained in *Johnson*, the *Feres* doctrine is grounded on, *inter alia*, "the existence of * * * generous statutory disability and death benefits" and the concern that such cases "would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." 481 U.S. at 689-690.[3]

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[3] Cf. *Chappell* v. *Wallace*, 462 U.S. 296, 299, 304 (1983) (holding that service members have no *Bivens* remedy against superior officers, and noting, *inter alia*, the harmful effects on military effectiveness of litigation against the government concerning injuries sustained in the course of duty).

A number of exceptions to the FTCA's waiver of sovereign immunity would equally bar tort recovery against the United States for injuries suffered by a civilian in a combat zone. For example, the combatant activities exception provides that sovereign immunity remains intact as to "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. 2680(j); see also 28 U.S.C. 2680(k) (no waiver for "[a]ny claim arising in a foreign country"); 28 U.S.C. 2680(a) (discretionary function exception). And should the injured party sue a government employee instead, the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 28 U.S.C. 2679(d)(1), provides for substitution of the United States in any common law tort suit arising within the scope of employment.

Contractor employees—in addition to being precluded from suing the United States and its personnel—are also precluded by statute from pursuing a negligence claim against their employer for injuries incurred while performing a government contract outside the United States. The Defense Base Act (DBA), 42 U.S.C. 1651 *et seq.*, which incorporates the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, establishes a system of worker's compensation for contractor employees that provides an exclusive remedy. 42 U.S.C. 1651(c) ("liability of an employer * * * under this chapter shall be exclusive and in place of all other liability of such employer * * * to his employees (and their dependents) coming within the purview of this chapter"); see 33 U.S.C. 905(a).

Of course not every tort suit arising from an injury incurred in a combat zone is covered by the aforementioned statutes and doctrines. Thus, in some suits

against private contractors not barred by the DBA, contractor defendants have raised other defenses.[4] For example, some contractors have argued that courts should apply the government contractor defense recognized by this Court in *Boyle* v. *United Technologies Corp.*, with modifications to take into account differences between service and procurement contracts. 487 U.S. 500, 511-512 (1988) (grounding the defense, in part, on the need to prevent courts from "second-guessing" military judgments, the concern that the "financial burden of judgments against the contractors would ultimately be passed through" to the government, and the belief that "[i]t makes little sense to insulate the Government against financial liability" for certain judgments

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[4] An amendment to the Defense Federal Acquisition Regulation Supplement Rule provides that "[c]ontract performance in support of U.S. Armed Forces deployed outside the United States may require work in dangerous or austere conditions. Except as otherwise provided in the contract, the Contractor accepts the risks associated with required contract performance in such operations." 48 C.F.R. 252.225-7040(b)(2). In responding to public comments, the Department of Defense (DoD) affirmed that "the clause retains the current rule of law," as expressed in recent court cases, "holding contractors accountable for the negligent or willful actions of their employees, officers, and subcontractors." 73 Fed. Reg. 16,768 (2008). The response also suggested that *Boyle* "does not apply when a performance-based statement of work is used in a services contract," and that the amended rule should not "invite courts to shift the risk of loss to innocent third parties" through "defenses based on the sovereignty of the United States" for the contractor's "own actions." *Ibid.* DoD, however, made clear that "it makes no changes to existing rules regarding liability," and that "[c]ontractors will still be able to defend themselves when injuries to third parties are caused by the actions or decisions of the Government." *Ibid.* To the extent there is ambiguity, this response was not intended to opine on the state of the law.

when it is the manufacturer, "but not when it contracts for the production").[5] Other defendants have argued for a federal preemption defense drawn from the combatant activities exception to the FTCA. See, *e.g.*, *Saleh* v. *Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009) (*Titan*), petition for cert. pending, No. 09-1313 (filed Apr. 26, 2010).[6] And, of course, some have asserted the political question doctrine as a bar.

Whatever the defense asserted, the decisions addressing them—and the various statutes and doctrines in this area more generally—reflect an understandable discomfort with readily subjecting the actions of government contractors who provide services to the U.S. military in war zones to private civil suits under state tort law. The decisions also evince genuine concerns about second-guessing military judgments, burdening the military and its personnel with onerous and intrusive discovery requests, and otherwise interfering with and detracting from the war effort. As a general matter, these concerns are well-founded. What is less clear, particularly absent further percolation in the lower courts, is the appropriate doctrinal framework under which to

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[5] See, *e.g.*, *Fisher* v. *Halliburton*, No. H-05-1731, 2010 WL 519690, at **7-8 (S.D. Tex. Feb. 8, 2010) (questioning whether *Boyle* applies to service contracts); *Askir* v. *Brown & Root Servs. Corp.*, No. 95 Civ. 11008, 1997 WL 598587, at *5 (S.D.N.Y. Sept. 23, 1997) (government contractor defense applicable to performance contracts).

[6] See also, *e.g.*, *Taylor* v. *Kellogg Brown & Root Servs., Inc.*, No. 2:09cv341, 2010 WL 1707530, at **7-12 (E.D. Va. Apr. 16, 2010) (recognizing preemption under combatant activities exception); Br. in Opp. App. 7a-17a (declining to adopt combatant activities exception); *Lessin* v. *Kellogg Brown & Root*, No. CIVA H-05-01853, 2006 WL 3940556, at **4-5 (S.D. Tex. June 12, 2006) (same).

determine whether a particular claim may proceed and, if so, to what extent.[7]

2. The court of appeals in this case was confronted with only one of the several defenses potentially available to private contractors operating in a combat zone—the political question doctrine. Prompted by the sorts of concerns discussed above, the court ultimately concluded, after discovery and extensive analysis, that petitioner's negligence claims presented nonjusticiable political questions. In so holding, the court sought to avoid adjudication of a case that it feared would require judicial second-guessing of sensitive military judgments. Although the court may have reached the wrong conclusion under the political question doctrine, review by this Court is unwarranted. There is no conflict among the courts of appeals on this legal issue, and there are obvious benefits to deferring consideration of cases arising in this context until lower courts have more fully considered this and other legal doctrines that may bar a suit or otherwise limit liability in circumstances such as these.

a. The political question doctrine is "primarily a function of separation of powers," *Baker* v. *Carr*, 369 U.S. 186, 210 (1962), and "is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government," *United States* v. *Munoz-Flores*, 495 U.S. 385, 394 (1990). It thus "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed to the halls of Congress or the confines of the Executive Branch." *Japan*

[7] Irrespective of the availability of private tort remedies, contractors remain subject to applicable federal criminal law and contractual remedies, the enforcement of which is under the purview of the United States Government.

Whaling Ass'n v. *American Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

In *Baker*, this Court identified six characteristics "[p]rominent on the surface of any case held to involve a political question" including, as relevant here (see pp. 5-8, *supra*), "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." 369 U.S. at 217. To determine whether "one of these formulations" is applicable, the court must engage in a "discriminating inquiry into the precise facts and posture of the particular case." *Ibid.*

The Constitution confers on the Executive and Legislative Branches authority over the military. See U.S. Const. Art. I, § 8, Cls. 11-16; Art. II, § 2, Cl. 1. Although not "every case or controversy which touches foreign relations lies beyond judicial cognizance," *Baker*, 369 U.S. at 211, military affairs feature prominently among the areas in which the political question doctrine traditionally has been implicated. In *Gilligan* v. *Morgan*, 413 U.S. 1 (1973), for example, this Court held that the political question doctrine barred a suit seeking injunctive relief based on allegations that the National Guard used excessive force in responding to Vietnam war protesters at Kent State University, because "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments." *Id.* at 5, 10. Indeed, the Court found it "difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches," and "difficult to conceive of an area of

governmental activity in which the courts have less competence." *Id.* at 10.

Likewise, in *Aktepe* v. *United States*, 105 F.3d 1400, 1403-1404 (1997), cert. denied, 522 U.S. 1045 (1998), the Eleventh Circuit held that the political question doctrine barred claims against the United States after the Navy fired live missiles at a Turkish ship during a joint training exercise, because deciding the negligence claims would inevitably require a court to determine whether members of the military exercised reasonable care during the training exercise and because the court lacked judicially manageable standards to judge "how a reasonable military force would have conducted the drill." And in *Tiffany* v. *United States*, 931 F.2d 271, 275, 277-278 (1991), cert. denied, 502 U.S. 1030 (1992), the Fourth Circuit held that the political question doctrine barred tort claims against the United States arising from a collision between a private plane and an Air Force jet sent to intercept that plane, because adjudicating such claims would require the court to "second-guess[] judgments with respect to potentially hostile aircraft." See also *Corrie* v. *Caterpillar, Inc.*, 503 F.3d 974, 982, 984 (9th Cir. 2007) (holding suit against private corporation barred by the political question doctrine where claims challenged U.S. military assistance to another country).

b. The court of appeals relied on the legal principles developed under the political question doctrine in these cases, but may have ultimately erred in applying them to the particular facts of this case. Its conclusion that adjudication of petitioner's negligence claims would necessarily call for a review of the propriety of sensitive military judgments and policies, and that it lacked judicially manageable standards to do so, may have over-

looked a narrower way of understanding petitioner's claims.

Petitioner does not assert that respondents were negligent for engaging in conduct ordered or approved by the military; she argues that within the general parameters set by the military, Irvine and KBR acted negligently with respect to driving and supervision. Pet. 13. Thus, the court identified "the question before the [district c]ourt" as "what a reasonable driver subject to military control over his exact speed and path would have done." Pet. App. 32a (internal quotation marks and citation omitted). It may be possible for the trial court to factor military standards and orders into the inquiry as external facts to be taken as a given, such that the trier of fact would not be required to question the wisdom of military judgments.

Under such an approach, the jury could conclude that Irvine failed to behave in a reasonable manner *within* the parameters established by the military. For example, one could envision such a result if petitioner was able to prove that Irvine was not paying attention when he took the second curve. See Br. in Opp. App. 7a (Irvine could have been "driving the truck within the speed limit set by the military yet in a manner that was negligent in some other respect."). Or the jury could conclude that Irvine failed to comply with military orders if petitioner could prove that Irvine exceeded the speed limit set by the military. Or the jury could decide, conversely, that given the military parameters and the circumstances present in Iraq at the time, Irvine acted in a reasonably prudent manner. In short, if the parameters set by the military were not followed, then there would be no cause to second-guess military judgments as such. If they were followed, then such constraints

presumably could be taken into account in assessing whether Irvine acted reasonably under the circumstances. Either way, adjudication of petitioner's claims might not require searching judicial inquiry into the soundness of a distinct military judgment, or the considerations underlying it, in the manner that lower courts have regarded as barred by the political question doctrine.

The court may also have erred in finding "no readily available judicial standard with which to answer this question." Pet. App. 32a. To be sure, jurors may be less able to rely on their "common sense and everyday experience," *id.* at 33a, to determine what a reasonably prudent person would do in these challenging circumstances, but that does not mean that the issue is always nonjusticiable under the political question doctrine. A juror may not be readily familiar with the intricacies of a complicated malpractice or products liability claim, but the introduction of documentary and testimonial evidence, including expert testimony, permits courts to resolve such claims. Even so, the need for certain evidence in a suit against a private contractor may itself give rise to serious concerns (*e.g.*, classified information in certain circumstances, burdens on the military), rendering such evidence unavailable—and perhaps independently precluding the adjudication of some combat-related tort claims, greatly complicating the adjudication of others, and raising broader concerns about such litigation.

c. In any event, there is no circuit conflict on the question presented. Only three court of appeals decisions have addressed the political question doctrine in this context, and two (including this case) are from the Eleventh Circuit. Petitioner does not claim an intra- or

inter-circuit conflict. Accordingly, this Court's review is unwarranted.

In *McMahon* v. *Presidential Airways, Inc.*, 502 F.3d 1331 (2007), the Eleventh Circuit affirmed the district court on interlocutory appeal, holding that the political question doctrine did not preclude tort claims brought by service members against a civilian contractor arising from the crash of a contractor-operated plane carrying troops in Afghanistan. While recognizing that "military activities often give rise to political questions," *id.* at 1358, the court concluded that "at least on the limited record now before" it, the contractor "has not shown that the military retained control or responsibility over the aspects of [its] operations that [plaintiff] is challenging," *id.* at 1360, 1362. The court also determined that manageable standards existed to adjudicate those claims, even though the standards would have to be modified to take account of the "less than hospitable environment." *Id.* at 1364 ("We readily acknowledge that flying over Afghanistan during wartime is different from flying over Kansas on a sunny day. But this does not render the suit inherently non-justiciable."). In the end, the court made clear that it did "not (and could not) hold that this litigation will not at some point present a political question." *Id.* at 1365. The case has since settled. See 05-01002 Docket entry No. 335 (M.D. Fla. Apr. 1, 2010).

In *Lane* v. *Halliburton*, 529 F.3d 548 (2008), the Fifth Circuit held that the political question doctrine did not preclude claims brought by contractor employees injured or killed when insurgents attacked their fuel convoy in Iraq. The employees alleged that the contractor authorized the convoys despite knowing the routes were vulnerable to insurgent attacks, and that the con-

tractor made fraudulent promises in recruiting employees regarding the level of protection drivers would receive. *Id.* at 555. The court concluded that it appeared such claims could be resolved "without second-guessing the acts and decisions of the Army," but acknowledged that the "negligence allegations move precariously close to implicating the political question doctrine, and further factual development very well may demonstrate that the claims are barred." *Id.* at 567. The case was remanded to the district court and, after discovery, the defendant contractors renewed their motion to dismiss on political question grounds. The district court denied that motion, *Fisher* v. *Halliburton*, No. H-05-1731, 2010 WL 519690, at *10 (S.D. Tex. Feb. 8, 2010), and the defendants have filed an interlocutory appeal, *id.* No. 10-20202 (5th Cir. filed Mar. 31, 2010).

The Fifth and Eleventh Circuits thus agree that state law tort suits against private contractors are barred by the political question doctrine if adjudication would require reexamination of sensitive military policies or judgments. And they agree that determining whether such reexamination is required will often necessitate a developed factual record. The differing outcomes in this case, on the one hand, and *McMahon* and *Lane*, on the other, are based not on divergent understandings of the applicable legal principles, but on the fact that "different cases involving different claims require their own discriminating inquiry under *Baker*." *Lane*, 529 F.3d at 568. There is no conflict among the courts of appeals.

d. As developed and applied in this context by the lower courts, the political question doctrine involves an inherently factbound inquiry that can itself be unduly burdensome, intrusive, and unpredictable. One of the

government's primary concerns is that the increasing litigation-related demands on the military and its personnel will disrupt and detract from the military's paramount duty to provide for the national defense. Cf. *United States* v. *Stanley*, 483 U.S. 669, 682 (1987) (recognizing that the government's interests are also threatened by the prospect of "compelled depositions and trial testimony by military officers concerning the details of their military commands"). Yet the applicability of the political question doctrine in this context tends to be resolved only after extensive discovery—discovery that very well may involve military personnel and documents, thereby raising these very concerns. A suit by or on behalf of an injured service member against a contractor may also effectively implicate the service member's relationship with his commander or other military officials, especially when the contractor's operations are integrally related with military operations Cf. *Feres*, 340 U.S. at 146.

For reasons such as these, the D.C. Circuit's recent decision in *Titan*, *supra*, drawing on the combatant activities exception in the FTCA, 28 U.S.C. 2680(j), found common law damage actions preempted "where a private service contractor is integrated into combatant activities over which the military retains command authority." 580 F.3d at 9. In that court's view, the military's interests are "equally implicated whether the alleged tortfeasor is a soldier or a contractor engaging in combat[-related] activities at the behest of the military and under the military's control," "the prospect of military personnel being haled into lengthy and distracting court or deposition proceedings" is just as likely, and "finger-pointing" would inevitably lead to "extensive judicial probing of the government's wartime policies." *Id.* at

7-8. These concerns do not necessarily render a case nonjusticiable under the political question doctrine. But whether or not they do—and regardless of the merits of the court's particular approach in the circumstances of *Titan* and whether other courts of appeals will agree with it—the courts have begun to grapple with these issues and have identified significant concerns when state tort law is used to address private claims against government contractors that arise out of services they provide to the U.S. military in war zones.

In the end, consideration of the applicability of various defenses in suits against contractors supporting military operations in war zones would benefit greatly from further percolation. See *Vasquez* v. *United States*, 454 U.S. 975, 976 (1981) (Stevens, J., respecting the denial of certiorari) ("Often the law develops in a more satisfactory fashion if this Court withholds review of novel issues until differing views have been expressed by other federal courts.") (footnote omitted). The lower courts are able to examine the full array of relevant defenses—in conjunction with one another and in light of the relative benefits and burdens of each. This case presents only one of several such defenses, and it does so in the absence of a circuit conflict and at a time when the courts of appeals are only beginning to consider the broader issues involved in litigation in this area. The Court should deny the petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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